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Explaining This Issue

THIS issue of the JOURNAL is devoted almost wholly to a report of the Annual Meeting of the Association at Denver. It is believed that the addresses there delivered furnish valuable material for the Bar in the campaign now getting under way for procedural changes to secure a better administration of justice in this country. Unfortunately it was not possible to include all the addresses at the sessions of the Association proper in this issue, but those omitted will appear in the September number, thus completing the picture of one of the most remarkable meetings in the Association's history and one at which, it is believed, the movement for the improvement of the administration of justice received a decided impulse. The forthcoming Annual Report will of course contain not only the addresses published in the JOURNAL but also a number of those delivered at the meetings of the various sections. Limitations of space compel the JOURNAL to confine itself largely to a presentation of what was said and done at the sessions of the main body.

Secretary MacCracken's Appointment

ON Aug. 9 President Coolidge appointed William P. MacCracken, Jr., of Chicago, Secretary of the American Bar Association, as Assistant Secretary of Commerce in charge of the regulation and development of commercial and other civil aviation. Mr. MacCracken took the oath of office on Aug. 11 and at once began on the important work which has been assigned to him. With his appointment, we are told in a Washington dispatch to the Chicago Daily News, "the government is prepared to embark upon a broad program of development in the commercial aviation field as an adjunct to the nation's transportation facilities. The last session of Congress enacted comprehensive statutes vesting in the department regulation and supervision over this new transportation agency, and the routing organization for carrying out the mandates of the new law has already been undertaken in the department itself."

The new Assistant Secretary brings unusual experience to the discharge of his important task. He is an experienced aviator and has for years paid particular attention to the practical problems of this newest of sciences. As chairman of the American Bar Association's Committee on the Law of Aeronautics for a number of years, and as general counsel for the National Air Transport Company, in the organization and development of which he was one of the prime movers, he has become thoroughly familiar with the legal questions which the evolution of a new industry naturally presents. His interest in, and connection with, recent legislation on the subject has further aided in giving him a comprehensive understanding of the situation.

The Mineral Law Section

AN account of the creation and organization of the newest section of the Association, that on Mineral Law, will be found in another part of this issue. The section starts with a fair membership but it is believed that many other members of the Association will desire to associate themselves with it. In order to do so it is only necessary for those interested to communicate with the Secretary, Mr. Peter Q. Nyce, Albee Bldg., Washington, D. C., who will be glad to make the necessary arrangements. It would be a good idea for those thus writing him to indicate in what particular branch of the Mineral Law they are specially interested. There is no additional expense involved in joining the section, as old members of course know, but as newer members may possibly not be informed.

Reference Books on the Constitution

IN view of the particular interest which attaches to the subject at this time we print herewith the full report of the Special Committee of the American Bar Association on Reference Books on the Constitution. This committee was composed of F. Dumont Smith of Hutchinson, Kan., Chairman; Edgar B. Tolman, of Chicago, Ill., and Prof. Ernst Freund of the University of Chicago. The report follows:

At a meeting of the Executive Council of the Association at Los Angeles in January, President Long received a letter from Mr. Harry Chandler of the Los Angeles Times, setting forth the need of a Reference Library on the Constitution for the schools, as an aid to students in preparing for the oratorical contests being conducted annually in the High Schools of the country by a group of newspapers. He said that one of the great difficulties that contestants labored under was the lack of suitable reference books; that the teachers, few of whom have studied the Constitution, did not feel competent to make a proper selection, and suggested that a special Committee of the Association be appointed to select and recommend a Reference Library.

President Long submitted the letter to the Executive Council and the Council instructed him to appoint such a Committee. President Long immediately appointed the undersigned, who began their work in February. We have divided our recommendation into two classes:

Class "A"

Books that we consider more or less indispensable for students of the Constitution of all ages, and particularly in schools and colleges.

Class "B"

Books for the more intensive student who desires a broader knowledge of the whole subject.

Our endeavor has been to select a well-rounded library that should cover the interpretation of the Constitution and its historical background with as little repetition as possible. We find that many lawyers are seeking information along the same line. The fact that we have omitted a particular book is not a reflection upon that book; this list is selected for a particular purpose. We have omitted meritorious works because they were duplications or not adapted to this particular purpose. The following is the list:

Class "A"

"THE CRITICAL PERIOD OF AMERICAN HISTORY," by John Fiske; Houghton-Mifflin Co., Boston; one volume.—An indispensable book to the study of the origin of the Constitution. Should be read first of all; describes the breakdown of the Confederation, the chaos, anarchy, and disunion into which the states were falling, the events which led up to the adoption of the Constitution, and carries the reader through to Washington's inauguration.

"THE STORY OF THE CONSTITUTION," by F. Dumont Smith, copyright owned by the Committee on American Citizenship; one volume.—This story is a brief history of the Anglo Saxon polity from the time that our Teutonic Ancestors first came in contact with the Romans down to the Adoption of the Constitution. It sketches briefly the Anglo Saxon conquest of England; the Saxon Kingdom, the Norman conquest and the long Constitutional struggle in the mother country.

"THE CONSTITUTION OF THE UNITED STATES; ITS SOURCES AND ITS APPLICATION," by Thomas J. Norton; Little Brown & Company, Boston; one volume.—This book takes the Constitution paragraph by paragraph and gives in clear, simple and direct style, the meaning of each, its derivation, where it is not original, and the manner in which it has been interpreted and applied by the Supreme Court. It is a book of as much value to the Lawyer as to the student in the schools and colleges.

"THE CONSTITUTION OF THE UNITED STATES," by James M. Beck; George H. Dorand Co., New York; one volume.—This book covers in narrative form the events leading up to the meeting of the Constitutional Convention; describes the personnel of that great body and the various struggles and compromises from which it was adopted.

"THE SHORT CONSTITUTION," Wade and Russell; American Citizenship Society Press, Grand Rapids, Mich.; one volume.—

Judge Wade, of the Federal Bench of Iowa, has devoted many years to citizenship work and is really the father of the Committee on American Citizenship. The book is elementary in character, especially adapted to the use of teachers who are required by state laws to teach the Constitution, as it analyzes briefly and clearly every part of the instrument as well as the nature of our State Governments.

"AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION," by Professor Charles E. Martin, of the University of Washington. Oxford University Press; New York; one volume.—This book gives the charters of the Colonies and their Constitutional struggle with the Crown; it cites and analyzes the leading cases that have developed the Constitution. The closing chapters, "Current Constitutional Controversies" and "American Ideals," are particularly valuable.

"CONGRESS, THE CONSTITUTION AND THE SUPREME COURT," by Charles Warren; Little Brown & Co., Boston; one volume.—This book collates all of the leading cases in which Acts of Congress have been held unconstitutional; it gives for the first time a full description of the much discussed Five to Four decisions.

Class "B"

"THE FEDERALIST," Lodge's edition; G. P. Putnam's Sons, New York; one volume.—This book is a classic and needs no comment.

"THE SUPREME COURT IN THE UNITED STATES," by Charles Warren; Little Brown & Co., New York; three volumes.—This is the Historical work that received the Pulitzer prize last year. It would be suitable for Class A if Mr. Warren would compress it into one volume, thus making it available to a larger circle of readers.

"LIFE OF JOHN MARSHALL," by Albert J. Beveridge; Houghton, Mifflin Co., Boston, four volumes.—This book is not merely a biography of John Marshall, but a complete political and constitutional history of the thirty-five years of Marshall's service on the Supreme Bench. It is the standard work on this subject.

"OUR CHANGING CONSTITUTION," by Charles W. Pierson; Doubleday, Page & Co., New York; one volume.—This volume of one hundred and seventy pages emphasizes the change of the Constitution through interpretation, neither commending nor criticizing this tendency but describing it with great clearness.

"ALEXANDER HAMILTON," by Frederick G. Oliver; G. P. Putnam's Sons; New York; one volume; "JEFFERSON AND HAMILTON," by Claude D. Bowers, Houghton, Mifflin Co., Boston; one volume.—These books are bracketed because they are complementary to each other. While each is in a sense partial and partisan, they both together give a vivid portrayal of the two leading figures representing antagonistic views of the Constitution, in its formative stages.

"THE CITADEL OF FREEDOM," by Randolph Leigh; G. P. Putnam's Sons, New York, one volume.—Mr. Leigh is the Director of the Oratorical Contest hereinbefore referred to. His book gives very briefly an account of the Constitutional Convention; and an attractive picture of the Founders. It is chiefly valuable in its description of the change in our State Governments from the Representative form towards pure Democracy by the Initiative, Referendum and Recall.

F. DUMONT SMITH,
EDGAR B. TOLMAN,
ERNST FREUND,
Committee.

National Research Endowment

ELIHU ROOT, Charles Evans Hughes, John W. Davis, Owen D. Young and Henry M. Robinson, are among the twenty-six members of the special board of trustees of the National Research Endowment. They are directing an undertaking to raise $20,000,000 for research in pure science. The board was formed at the request of Albert A. Michelson, president of the National Academy of Sciences. Mr. Herbert Hoover is to serve as chairman of the group. The National Research Endowment will be used to facilitate and expand the work of experienced investigators in directions indicated by their proposed programs of research. If this fund is raised, it will make the career of research more productive and more attractive, drawing into graduate work many brilliant students in the various sciences, who are now lost to the field.

THE ADVANCE OF THE AMERICAN BAR

Ineffectiveness of Enforcement of Criminal Law—Public Dissatisfaction With Civil Procedure —Attempts to Deal with Situation—Duty of American Lawyers to Bring About Improvements Unshackling Courts and Simplifying Procedure—The Bar's Mission of Constitutional Defense—Individual Liberty and Local Self-Government Endangered*

By Hon. Chester I. Long
President American Bar Association, 1925-26

THIS is the forty-ninth annual meeting of this Association. At its first meeting in Saratoga Springs there were 75 members present. Twenty-five years ago it met in Denver. There were 306 members present. It is the oldest and largest National Bar Association. Allied with it are the Conference on Uniform State Laws, 36 years old, and the American Law Institute, four years old, both of which will report at this meeting.

This Association has more than doubled its membership in the past 10 years, and is fairly representative of the American Bar. By the American Bar, I mean all lawyers; those who belong to bar associations and those who do not; those who are on the Bench and those who practice at the Bar. In this day and age a single individual can do but little. It requires organized effort to accomplish much. The service of the lawyer is directed along two lines; first, in the practice of his profession; second, in doing his part as a citizen of the Republic.

But little attention is given to judicial procedure as long as the courts function in a satisfactory way. They have not been so functioning, and public attention is now directed to the courts and especially to the enforcement of the criminal law. For 25 years the general belief has been that all the ills from which society suffers can be cured by legislation; that a new law would always set things right. If the evil was particularly injurious a commission was created and then all things would be corrected. A change in public opinion is now apparent; there are many doubters in the universal efficacy of more laws. There are a few, and their number is rapidly increasing, who believe that the enforcement of laws we now have is more important than to fly to other laws we know not of. Recently the public has suddenly realized that the enactment of a law is only part of the duty of those who would improve conditions in society. They have also come to realize that commissions are not all that is necessary. The legislatures have invested commissions with quasi-judicial powers, thinking that they can perform better than the courts; but that is passing. There will not be as many commissions created in the next 10 years as in the past 10. It is becoming more difficult to secure the creation of new commissions. Why? Because of the dissatisfaction that exists with the administration of justice by such commissions. We have tried commissions, arbitration, and other ways of settling controversies, and now the public is coming back to the courts.

The violations of law have been so flagrant that the demand for law enforcement is now heard everywhere. Unfortunately, the courts are unable to cope successfully with the existing situation. They also have been the victims of too much legislation. The legislatures have told them in the minutest detail just how to proceed. They have been told to go this way and then that way. They have been given so many directions how to go that they have hardly gone at all. They have been kept so busy reading the legislative sign boards that they have almost stood still.

At present the enforcement of the criminal law is particularly ineffective. We have had much investigation and many surveys; we have begun to apply the remedies. This Association has a Special Committee on Law Enforcement. It made a complete report in 1922. Several members of the committee then went to England and France and a very exhaustive report was made in 1923. We have a Section on Criminal Law. It has been particularly active and has done much in the way of gathering valuable information.

At the request of this Association, through its Special Committee on Law Enforcement and its Section on Criminal Law, the American Law Institute has undertaken the work of preparing a Model Code of Criminal Procedure. Progress has been made, although the work has been so recently begun. (The American Law Institute Proceedings, Vol. III, p. 439.) It is too much to hope that when completed any state will adopt this code as a whole. However, it will be a model for the use of Congress and the legislatures. That such a code is necessary is apparent. The public has lost faith in the efficacy of the courts and their results in the enforcement of the criminal law. Crimes of violence have been so frequent that in several states certain classes of citizens have taken into their own hands the protection of their lives and property. This is true of bankers. The money entrusted to them has been so subject to theft and robbery, without any punishment of the criminals who took it, that bankers' associations in several states have organized vigilance committees to protect their property. They are training bank clerks to shoot to kill. They recommend certain kinds of guns because they are more deadly. Greater rewards are given for dead bandits than for live ones. This is an astounding condition and should not exist in any civilized community. Such committees were a

*Presidential Address delivered on July 14 at 49th Annual Meeting of the American Bar Association, held at Denver, Colo., July 14-16, 1926.

necessity in the early days in the mining camps of the West where no laws had been enacted, but in the present state of society, where laws against such crimes are found on the statute books, such course is indefensible, and should not be necessary. It is the greatest reflection on our courts, and a most conclusive proof that they do not properly function. The slow processes of the law and the uncertainty of the outcome have induced criminals to perpetrate crimes without fear of detection or punishment. For the same reasons the owners of property defend it themselves and do not rely on peace officers.

A recent editorial in a daily paper, written by a former Governor of one of our states, contained the following:

> A Filling Station Agent in Kansas City lost patience at the tenth hold-up and armed himself. The eleventh bandit to visit his station has just been buried. He had three bullet holes in him when the filling station agent ceased firing. It's a simple method that ought to be followed generally by filling station employees. In these days, when the usual protective agencies of the law lack capacity to provide adequate protection, society is justified in adopting some of the primitive methods which were effective in the days before we turned everything over to experts and specialists.

In several states there have been organized crime commissions whose jurisdiction relates only to the apprehension, prosecution and trial of persons accused of crime. The creation of these commissions is in response to the widespread demand, found everywhere, for an improvement in the way and manner in which we have been enforcing criminal laws.

Two important unofficial surveys have recently been made—one in Cleveland, the other in Missouri. New York has made progress in the trial of persons accused of crime. Crime today is organized, and it faces an American Bar that is not fully organized. If crime is made unprofitable, it will decrease. Increase the chances of failure, make the taking of human life hazardous, and crimes of violence will be fewer.

The Joint Legislative Committee in New York made 32 recommendations for changes in the laws of that state in criminal procedure. Nearly all of these recommendations were enacted into law. The progress made in the enactment of these laws induced the legislature to provide for a permanent Crime Commission. The commission is to examine into the crime situation in that state, with special consideration as to crimes of violence. It is to report to the next session of the legislature and to present bills to carry its recommendations into effect. The members are to serve without compensation, but their necessary expenses are to be paid.

This commission is the outgrowth of the unofficial National Crime Commission. It is the first official recognition of the widespread prevalence of crimes of violence, and the demand of the public that the courts shall give relief to a situation that has become unbearable.

The situation relating to judicial procedure was described by Elihu Root in 1914 in an address to this Association. Mr. Root said:

> During the 60 odd years which have elapsed since the reform of American procedure by codification there has been a constant movement towards the same old condition of complex and technical procedure, caused by legislative interference with the details of practice. In many states, year by year, well meaning lawyers have been putting new provisions into codes of procedure, expanding elaborating, refining, telling how everything shall be done, how every step shall be taken, how every paper shall be framed, endeavoring to meet every difficulty encountered in individual practice by a new provision of law. The New York Code, as a horrible example, has been swelled in this way to more than eight times its original dimensions.

This was said twelve years ago. It is no better today, but worse.

The dissatisfaction with judicial procedure in its relation to the enforcement of criminal laws also finds its counterpart in the loss of confidence by the public in the courts with relation to civil procedure. This lack of confidence in our courts is shown by the demand for the recall of judges and judicial decisions; by the creation of commissions with quasi-judicial powers; by efforts to make Congress, and not the Supreme Court of the United States, the court of last resort on constitutional questions.

These remedies were all suggested and urged by laymen as cures for the disease that existed then and exists now. They were all wrong then, and they are all wrong now. These were efforts that, although sincerely made, could not and should not have succeeded.

The question is: What shall we do to remedy the situation?

I believe that the public is willing at last to leave it to the lawyers, if the lawyers will do it. Lawyers have ever been noted for their conservatism. They are inclined to continue to use the rules of the game that they have learned and know. They are adverse to changing them. They are slow to take up anything that is new, and being inclined to oppose changes in procedure, the laymen have taken the lead in judicial reform. In the past this has been most unfortunate. In a recent address, Dean Roscoe Pound used the following significant words in relation to the work of laymen in judicial reform:

> More than one unhappy feature of American administration of justice which is a factor for ill in the conditions of which complaint is made so justly today, is a result of short-sighted, ignorant application of lay common sense to difficult problems of law and of judicial organization and administration, which called not for common sense, but for the uncommon trained sense of experts.
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> More than one bad feature of the reform of American procedure that swept over the country after 1850 is traceable to lay application of the legislative steam roller to problems that did not admit of that sort of solution. And this is even more true of our administration of criminal justice. Nowhere has lay insistence upon legislative tinkering with details, without regard to the legal setting of those details, been more continuous and persistent; nowhere have the courts been more tied down by minute and detailed provisions than in criminal law and criminal procedure.

He then very aptly states the necessity of having reforms made by those who understand existing law and how the changes should be made:

> In law as everywhere else, we must rely upon those who know the problems to be met, know the materials with which they are to be met, know the art of the craft that will apply the materials, and know something at least of the experience of the past out of which those materials have been wrought. And yet, so long as lawyers persist in an attitude of juristic pessimism—so long as they decry the doing of things by laymen and do nothing themselves—we must expect the public to strike out blindly in the endeavor to do the best they may, when bad situations arise and are suffered to continue.

Common law lawyers opposed the establishment of equity courts, and were not reconciled to

the use of this branch of jurisprudence for many years. The leading lawyers were not favorable to the Constitution of the United States when first adopted, expressing the fear that it would be fatal to liberty. A situation confronts us now that demands changes and reform in procedure that should be made by lawyers and not trusted to the inexperience of laymen.

The judges have been obeying this or that law, passed at the instance of some individual lawyer in the legislature; many of such laws must be modified before we can improve the administration of justice.

The lawyers in the several states know what should be done to remedy the law's delay and make justice more certain. They must act. No reform law can be drafted that will apply to all the states. A general outline can be presented and discussed, but a plan that is suitable for all the states cannot be adopted. Legislation can be enacted that will suit the situation in that particular state.

Procedure should be simplified in the United States as it has been in England. They had the same confusion and delay there. They reformed their procedure. We have not. The legislatures should lay down broad principles and the details should be filled in by rules of court. Much tinkering has been done. It should stop. Let us proceed to apply the remedy. A large number of laws that now interfere with speed and certainty in the administration of justice should be repealed.

Chief Justice Taft, in a recent letter to my predecessor, said:

> Consider one important step forward that might be taken at the instance of the bar associations. They ought to press for a repeal in a number of the states of legislation which now restricts the opportunity of the judge to exercise proper control in the trial of cases and withholds from him a useful and necessary freedom in advising juries as to the law and its application to the facts of the case, and makes him merely a nominal factor in the trial. The ineffectiveness of the judges' functions in jury trials in such states is one reason for the demoralizing verdicts which are reported to the press.

This Association and the state bar associations have done much in the past—more can be done in the future. The Committee on Jurisprudence and Law Reform is giving close attention to this subject. We, as lawyers, are no more responsible than other citizens for the enactment of laws, but we are more responsible for their enforcement. If the judicial machinery does not work, we ought to know why and suggest the repairs that should be made to improve it. The legislatures have gone too much into detail in providing for procedure in courts. The judges have been shackled. Some of the shackles should be removed. They have been put into straight jackets. They should wear judicial clothes that do not fit so closely. Commissions have been permitted to make their own rules. Why not trust the courts to do the same? If the avalanche of laws can be checked, I believe we can obtain a reform in judicial procedure. If the lawyers in a state agree, the laymen in the legislature will usually follow their recommendations on changes to be made in judicial procedure. The first place for agreement should be in the several state bar associations. A Judicial Council, composed of judges of appellate and trial courts and practicing lawyers, is a compact body that will study the questions carefully and report to the bar association and the legislature. A proposition on procedure that has the support of the judicial council and the state bar association will usually be passed by the legislature. When the legislative shackles on judicial procedure are removed, it will then be up to the judges to perform. They can now do much without legislation to increase the speed and certainty of jury trials, but they can do much more when certain restrictions are removed. Lawyers will play according to the rules of the game. The rules should be changed; the judges can bring about these changes after the legislature removes the restrictions.

Lawyers are usually conservative, especially those who are in active practice. Reforms, however, should come from within the profession, and not from without. In this age of accuracy and speed our judicial machinery is not up to date. Let us see that our working tools are repaired, not destroyed. Let us remove the obstacles that impede the progress of jury trials. Let our slogan be "Slow down the Legislatures and Speed up the Courts."

Not within the memory of lawyers now living has there been so general an attack on judicial procedure as today. There is discussion everywhere, in the press, and on the platform, about the enforcement of the criminal law. There has been as much complaint in regard to the methods of procedure in civil cases. There is an awakened interest everywhere in law reform. It is very difficult to secure uniformity in judicial procedure. The procedure in the several states is now different and so the reforms must of necessity relate to a procedure now in force. Everywhere complaints are made that recommendations by state bar associations are given but slight consideration by legislatures. This is the result of lack of organization among lawyers. Nothing worth while can be obtained in the way of legislation without an organized and systematic effort. We have witnessed the results of organization, both in promoting and defeating legislation, but we have not taken the pains to perfect such organizations among lawyers. The results have been that, while state bar associations have recommended legislation, but few laws simplifying procedure have been passed. In order to simplify judicial procedure, it will be necessary first to improve the organizations through which the passage of needed laws only can be secured. We are in an age of organization. One individual does not count for very much any more. Organizations largely control legislation. If everyone else organizes, why not the lawyers, upon whom rests the responsibility of improving judicial procedure?

The individual is no longer dominant in legislation. An individual lawyer presenting a bill, even though he is in the legislature, is not given the consideration that would be given to the recommendation of a judicial council composed of judges and practicing lawyers who are daily engaged in the administration of justice; especially if that recommendation is also endorsed by the state bar association. I know that legislatures pay but little attention to what lawyers think should be done in substantive law, but I believe that they will pay marked attention to what they may recommend in procedure. A beginning has been made in a few of the states. This has come from the establishment

of judicial councils in Massachusetts, Ohio, North Carolina, Washington and Oregon. The Massachusetts Judicial Council has made a report to the legislature and has set forth the particular reforms that should be made in that state; some by the enactment of new laws and others by rules to be adopted by the courts. The Massachusetts Judicial Council consists of five judges and four practicing lawyers.

A judicial council, composed of a judge of an appellate court, a judge of a trial court, and several practicing lawyers, will command the respect of the profession and its recommendations will have weight with the legislature. When the recommendations of such a judicial council have been approved by the state bar association, and then persistently urged upon the legislature, results will be obtained that otherwise could not be secured.

For several years this Association, through its committees, has urged Congress to pass a bill giving the Supreme Court of the United States the power to prescribe by general rules for the district courts, the form of process, writs, pleadings, motions and the practice and procedure in actions at law. That court has exercised for many years such powers, in making rules of practice in equity, admiralty and bankruptcy. The bill has met with very determined opposition in the Judiciary Committee of the Senate. It has recently been favorably reported. We hope that it will become a law.

This bill recognizes that incident to the judicial power vested in the Supreme Court is that of making rules of procedure. It is a step in the right direction, and will result in uniformity in procedure in the federal courts in actions at law, as we now have in equity, bankruptcy and admiralty. It speaks for progress along the line of removing the shackles that now bind, retard and obstruct judicial procedure in the federal courts.

On the same day that this bill (S. 477) was reported to the Senate by the Judiciary Committee, there was also favorably reported by the same committee the Caraway Bill (S. 455) to amend the practice and procedure in the federal courts. It would take away certain powers of federal judges that have been exercised for years. It makes it reversible error for a federal judge to express an opinion on any point in the evidence, requires that the instruction shall be before, and not after, the argument, and that it must be in writing. The intention is to reduce the federal trial judge to the position of umpire, and to make it sure that he takes no part in the actual trial of cases.

The principles underlying these two bills are diametrically opposed. The Cummins Bill is a step in the direction of according the courts the right to make rules that will simplify procedure and bring about satisfactory results where there is now confusion and dissatisfaction. The Caraway Bill is a sample of legislative tinkering that has been going on for many years, that has caused the dilemma in which the courts now find themselves. If the Caraway Bill should become a law, it will place the federal courts in a position similar to that of many state courts. It will increase the dissatisfaction with court procedure and make worse the law's delay. The forward step that was taken by the establishment of a judicial council in the federal courts should not now be followed by a course that will retard rather than promote the administration of justice.

The Cummins Bill (S. 477) speaks for progress and uniformity, the Caraway Bill is tainted with retrogression and reaction. It is to be hoped that the Caraway Bill will be defeated.

I believe in the organization of judicial councils that shall have jurisdiction over procedure, both civil and criminal. A union of the Judicial Council plan of Massachusetts with the Crime Commission plan of New York is practicable and desirable.

The American Bar should meet the demands of the public and bring about reforms in judicial procedure.

It should also give attention to the questions not related to judicial procedure in which the public is interested. The American Bar Association has ever been the defender of the Constitution. Years ago when the recall of judges was a live issue this Association came to the defense of our judicial system and fought that dogma to its death.

When it recently was proposed to make Congress the court of last resort, the Special Committee on American Citizenship took up the gage of battle and opposed the amendment. We had a presidential campaign two years ago and one of the issues was whether this amendment should be adopted. The two major parties were opposed to the amendment. Over four million people voted for the candidate who favored the amendment, but he was overwhelmingly defeated.

Our most important duty to the public is to discuss our organic law. There is an awakened interest in the study of the Constitution and its Amendments. This has largely been the result of the demand for more amendments.

The American Bar Association has never hesitated to take a position on any legal question, especially a constitutional one. It has always discussed the Constitution of the United States, and defended it against attacks. That should be so, because it is the one profession the members of which, before they begin to discharge their duties, take an oath to support that Constitution. Public officials do, but other persons connected with private businesses and professions do not. The man who runs a store does not take an oath before he begins; the man working on the street is not required to do so; neither is the physician and members of other professions. We do, and so we ought to know the Constitution; we should have a comprehension of it; we should know when it is attacked; we should know when it is undermined; so looking into the history of our organization, we find it has not hesitated to take a position on questions relating to the Constitution of the United States.

There are two issues forming in this country on constitutional questions that lawyers should be informed upon. These two issues are, *first*, the preservation of individual liberty; *second*, the preservation of local self-government. These two issues are very closely related. There is a liberty of the individual that neither the state nor the national government can take from him.

"Liberty" is recognized in the Constitution. One of the purposes set out in the preamble is, "To

secure the blessings of liberty to ourselves and our posterity."

In the Fifth Amendment, which is a restriction on Congress, it is provided that no person shall be deprived of life, liberty or property without due process of law. The Fourteenth Amendment says that no state shall deprive a person of life, liberty or property without due process of law. We have had many decisions about the taking of life and property without due process of law, but very few about taking away liberty. What is liberty? The Supreme Court has recently defined it. The states of Nebraska, Iowa, and Ohio passed laws that restricted the freedom of learning. They prevented the teaching of modern languages in the schools of the respective states below the eighth grade. Nebraska and Iowa prohibited all modern languages, while Ohio said that German should not be taught in the schools of that state below the eighth grade. The question arose whether a teacher who had qualified himself for teaching modern languages could thus have his occupation interfered with. The Supreme Court in deciding these cases (262 U. S. 390) defined liberty as follows:

> Liberty denotes not merely freedom from bodily restraints, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It was decided in these cases that the liberty of the teacher to teach could not be thus impaired. In Oregon a law was enacted that would have destroyed all private schools below the eighth grade. The Supreme Court decided (268 U. S. 510) that the liberty of the parent or guardian to choose a school for the child was invaded. The court said that the child did not belong to the state but that the parent or guardian had the liberty of choosing the school for the child. That law was declared unconstitutional as an invasion of liberty.

In Tennessee, a law was passed that in teaching biology, it must be taught a certain way; that there must not be a conflict with the Bible story of creation, taken literally. A teacher violated the law; he was convicted; that case may go to the Supreme Court of the United States, to determine whether Tennessee can by legislative enactment control opinions.

As lawyers we are not interested in the contest between the fundamentalist and the modernist. We are not interested, as lawyers, whether biology as taught in our schools and colleges or the Bible story of creation, taken literally, is correct. That is for the theologian and scientist. We are interested as lawyers, in determining whether a state can control our opinions by legislative enactment, as it does our actions. That question concerns all of us. As lawyers, we are concerned in the question as to whether or not the state can say how a certain subject must be taught in the schools of the state, and thus interfere with the student in acquiring useful knowledge. His desire to learn both sides of any question should not be denied. We are concerned with the question, whether the law interferes with the liberty of the teacher to teach in Tennessee, as the liberty of the teacher to teach modern languages was interfered with in Nebraska, Ohio and Iowa; also whether there is an interference with the liberty of the child to learn. That is the question, and that is what the lawyers and the bar associations of this country have a right to consider. The question is whether the law interferes with the principles on which our government is founded. Has not the state the right, either by law or through its boards of education, to say what shall be taught in the schools? It has, if its restrictions are reasonable. It cannot be arbitrary. The Supreme Court decided that the state had acted in an unreasonable and arbitrary manner, and no state can do that.

We live with persons who have rights equal to our own. To secure our own rights we must submit to a reasonable regulation of our actions. This is necessary in society. Washington in his letter transmitting the Constitution to Congress said:

> Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained.

While we must submit to reasonable regulations of our actions there is a tendency to regulate our opinions as well. This cannot be done in a land of liberty. Constitutional limitations forbid. The effort to control opinions by law is not new. The conflict over religious freedom was fought out in Virginia before the Constitution was made. Liberty of opinion is older than the Constitution. Shortly after Jefferson wrote the Declaration of Independence he resigned from Congress and was elected to the legislature of Virginia. He was there placed upon a committee to codify the laws. In pursuing that work he wrote several statutes that radically changed the laws of that state. One of these was the statute for religious freedom. The others were passed but this met with such opposition that it was temporarily laid aside. In 1785, when Jefferson was minister to France, the contest was renewed. Patrick Henry, who was Governor, favored an assessment bill that provided for taxing all property for the support of teachers of religion. Provision was made for the taxpayer to designate the church to which he wanted his taxes to go. This bill aroused much discussion. Madison, who was in the legislature, opposed it and presented Jefferson's statute for religious freedom. The contest was on from the sea to the mountains and beyond. When the legislature later reconvened there was no one to support the Assessment Bill. Jefferson's statute for religious freedom was passed with but few amendments. After the contest was over Madison said:

> Thus in Virginia was extinguished forever the ambitious hope of making laws for the human mind.

It became the law in Virginia and is still the law in that state. The Virginia statute is published in full in the Bar Association JOURNAL for July, 1925.

William J. Bryan in 1904 (Foreword in Vol. 8, Monticello Edition, Jefferson's Writings), had this to say about the Virginia Statute for Religious Freedom:

> In the preamble to the Statute for Religious Freedom Jefferson put first that which I want to speak of last. It was that the regulation of the opinions of men on religious questions by law was contrary to the laws of God and to the plans of God. He pointed out that God had it in His power to control man's mind and body, but that he did not see fit to coerce the mind or the body into

> obedience to even the Divine Will; and that if God himself was not willing to use coercion to force man to accept certain religious views, man uninspired and liable to error ought not to use the means that Jehovah would not employ. Jefferson realized that our religion was a religion of love and not a religion of force. . . . .
>
> I believe that, when Jefferson assisted in establishing religious freedom, he assisted in giving to our government its strongest support.

Jefferson, shortly before his death, wrote his epitaph. Passing by that he had been a member of the Continental Congress, Governor of Virginia, member of the legislature of Virginia, Minister to France, Secretary of State, Vice-President of the United States, President of the United States, he put on his tombstone:

> Here was buried Thomas Jefferson, author of the Declaration of the American Independence, and of the Virginia Statute for religious freedom, and father of the University of Virginia.

Madison was in Congress and had much to do with drafting the first clause of the first amendment to the Constitution, which says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

This amendment was construed in the Reynold's case (98 U. S. 145) in an opinion by Chief Justice Waite who said:

> That the legislative powers of the government reach actions only and not opinions. . . . .
>
> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Thus Congress was forbidden to regulate opinions. The same restriction is on the states by the Fourteenth Amendment.

Liberty has been imperiled by the impairment of local self-government. Let the states resume and exercise the powers reserved to them. Restore liberty by restoring state control over local affairs.

Closely related to this question of liberty of opinion, or the control of opinions by law, is the other question of the preservation of local self-government. The two are allied. In the organization of this government we did not have only one government. We did not have but one at the beginning, and ought not to have but one now. We had two, a national government and the state governments. It took them both to make this federal government.

For the first 70 years the states were strong and the national government weak. Since the Civil War that has been changed. The national government has been increasing in power. The powers of the states have been steadily decreasing. Thus local self-government has been impaired. We have a dual form of government. It is the first attempt in history to establish such a government. It should continue as it was made in the beginning. Generally all government is carried on from one capital. This has not been so in this country. We started on the dual plan. Certain powers were delegated to the national government and over them the states have no control. Other powers were reserved to the states and as to them the national government has no concern. The dual plan on which we started has fortunately been followed so far. It has been preserved for 137 years.

Local self-government is in great danger today. The disposition is to do everything in Washington, and as little as possible in the 48 state capitals. The question for us, as lawyers, to consider is whether it is best for the people that organized this dual form of government. It has been gradual, almost imperceptible at times, but the drift has been all one way, and it has been done because Congress has been induced to exercise certain powers reserved to the states.

Elihu Root in his annual address in 1916 said:

> There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and the state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty. . . . .
>
> Powers thus conferred under special motives and for special purposes do not revert. They are continued. And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national power and local liberty in our system, will be destroyed and the breaking up of the union will inevitably follow.

I do not ask for any restrictions on the national government in its administration of interstate or foreign commerce, federal taxation, or those powers that are delegated to it by the constitution. But in recent years, there has been a disposition by the national government to take over police powers that heretofore have been controlled by the states. Part has been done by a Constitutional Amendment, and of course can only be changed by a repeal of the amendment. There have been four amendments to the Constitution in the past 12 years that have materially changed the relations between the national government and the states.

The concentration of power in the national government went on constantly until the proposed Twentieth Amendment was submitted. Congress in its wisdom thought it best that it should determine what persons under 18 years of age should work, how they should work or whether they should work at all. Congress seemed particularly anxious to control and regulate what is commonly called "Child Labor." It first passed a law to regulate it under the commerce clause. This was declared unconstitutional by the Supreme Court. It then passed another law and sought to regulate child labor under the taxing clause. This also was declared unconstitutional. It then passed the Twentieth Amendment and submitted it to the states to be ratified. Congress evidently assumed that the amendment would be ratified in due course as all other amendments recently submitted had been. This assumption was wrong. There was a sudden awakening. A few states ratified but a large majority rejected it. It has been defeated to date. The regulation of child labor will continue, where it is now, with the states. It is an appropriate field for local self-government. Conditions in the different states vary and legislation that is appropriate in one state may not be applicable in another. Those who opposed the Twentieth Amendment did so not because they were against the regulation of child labor. It was because this was the most flagrant invasion of local self-government that Congress had so far attempted.

There has been, however, during the past ten years an impairment in local self-government with-

out an amendment to the Constitution. The 50-50 appropriations, if expanded, are the most destructive plan so far devised. Under it Congress says to the states we will appropriate a dollar. You match it by appropriating another dollar. Then the two dollars shall be spent as the national government shall designate. There are six of these 50-50 appropriation laws now on the statute books. They have been referred to by different terms. The President calls them "subsidies." By others they have been termed the "Bribery of the States," but however named they are vicious in principle, destructive of local self-government and should not be extended into other fields not now occupied.

No one party is responsible for them; both parties are involved. Some of them were passed under the administration of President Wilson; some of them under President Harding. A halt has been called; not that any of those laws should be repealed, but that the policy should not be further extended. There are reasons why public roads should be an exception. The national government is interested in a system of post roads, and has been ever since the formation of the government. I do not ask that any of the six acts shall be repealed. That is not the proposition. Shall we go on? Shall we adopt it as a policy? There are other proposals; there is the one for the Department of Education that will take millions of dollars by placing education under the control of the national government. That is only one of the proposals that is up. The question is whether that is for the good of the country. It is lodging power over local affairs in Washington that has been heretofore exercised by the states. Is there any danger in this course?

I do not advocate the repeal of any of the last four amendments, nor the laws passed to enforce them. I do not favor the proposed Twentieth Amendment. I will not discuss the restrictions by Congress or state legislatures on liberty of actions. I am discussing the tendency to interfere with the liberty of opinions.

I will not discuss the wisdom of any of the last four amendments to the Constitution. They are adopted. We had 15 amendments to the Constitution until 12 years ago. We have had four more since that time. Those four amendments have materially changed the relations of the national government to the states. But it has been done. I will not discuss any of the laws that have been passed to enforce those amendments. I am calling your attention to amendments that are proposed. Lawyers, in their organizations, can have great influence on what is proposed to be done. There are proposals that change the relations between the national and state governments. When Congress adjourned a year ago there were pending over one hundred proposals to amend the Constitution of the United States, and most of them were to take power from the states and lodge it in the national government.

From the beginning there have been two governmental schools of thought. Hamilton represented the national school and Jefferson the state school. It took the union of both to make this nation great. I am of the Hamilton school, but I believe that we have gone too far in the concentration of power in the national government. Lincoln pleaded for the union of the states and called out troops to preserve that union. We of this day should stand for the union of the national and state governments. This is not the old states' rights doctrine that was settled at Appomattox; but it is the preservation of local self-government that was left to the states and the people by the reservations after certain powers were delegated to the national government.

Liberty with government! Through the ages there has been liberty without government. There has also been government without Liberty. But there has always been the hope for Liberty with Government. Man may live alone with liberty but he cannot live in society without government. He must give up some of his liberty in order to preserve the rest. Rome had liberty with but little government and then she had government with but little liberty. The nations of Continental Europe tried and failed. England tried and partly succeeded. Our experiment here has been the most outstanding and successful. We have finished what England began.

The Magna Charta, Petition of Right and Declaration of Rights in England, the Declaration of Independence, Bill of Rights and Fourteenth Amendment in the United States are sign posts that mark the progress made in the march toward liberty with government. After the failures to have liberty with government in the Old World the new world solved the problem. It was done by providing for an independent judiciary with power to declare that a law was not a law because it violated the Constitution. It was done by our dual form, the national government supreme in its sphere and the states in their sphere; the one not to interfere with the other.

What was lacking in the original constitution and the first 10 amendments to preserve liberty with government was supplied in the Fourteenth that forbids a state to take life, liberty or property without due process of law as the national government had been so forbidden from the beginning.

The one protection for the liberty of the individual is in the Supreme Court of the United States. The power has been exercised for over a century to declare when an act of Congress or of a state legislature is not a law because it violates the Constitution of the United States. In that power of the court there is more protection to individual liberty than in any other government since the beginning of governments.

Liberty will abide here if we maintain our dual nation; it will disappear when we destroy the even balance between the national and state governments.

The battle against Intolerance is on. The Freedom of Learning is in peril. The American Bar should take part in this contest. The forces are gathering to preserve liberty of opinion; liberty of the teacher to teach; liberty of the child to learn; and local self-government.

The advance of the organized American Bar in the preservation of the liberty of man, woman and child is very reassuring. Let us hope as the organized Bar increases in members, power and influence that the blessings of liberty and of local self-government may be made more secure to ourselves and our posterity.

OUR NEW PRESIDENT: CHARLES S. WHITMAN

CHARLES SEYMOUR WHITMAN was born on August 28, 1868, at Hanover, Connecticut. His mother was Lillie Arne, and his father, John Whitman, was a virile minister of the Presbyterian Church, who graced some of the more desirable charges in New England, New York, and Ohio. His ancestry was identified with early New England, with a strong religious and cultural background; and the somewhat itinerant character of his father's calling gave young Whitman an early acquaintanceship with the life and point of view of the Middle West, as well as of New York and New England.

Mr. Whitman was graduated from Amherst College in 1890, with the degree of Bachelor of Arts. His law studies were carried on at the New York University Law School, from which he was graduated in 1894, with the degree of Bachelor of aws. He has always been active in the Amherst alumni, and has served as president of the Amherst Alumni Association. He received the degree of A. M. from Williams College in 1904, and has received the degree of Doctor of Laws from Amherst College, New York University, Williams College, Hamilton College, Syracuse University, and Western Reserve University.

After graduation from Amherst, Mr. Whitman came to New York City, taught school, and studied law. After admission to the Bar in 1894, he began the practice of law, and also became active in civic and political affairs. During the administration of Mayor Seth Low, he served as Assistant Corporation Counsel under George L. Rives, and represented the Low administration in many important negotiations at the State Capital. Mayor Low rewarded his diligent service by appointing him a City Magistrate, in which judicial post he served from 1904 through 1907. During a part of that time, he was the president of the Board of City Magistrates, and introduced notable betterments in the procedure of the Magistrates' Courts.

Governor Charles E. Hughes appointed him a judge of the Court of General Sessions in 1907, and in 1909 he was the Anti-Tammany candidate for District Attorney of New York County. He made a rousing campaign and was elected, although Mayor Gaynor (Democrat) prevailed over the Republican nominee for Mayor. His first term as District Attorney began January 1, 1910 and ended December 31, 1913.

District Attorney Whitman attracted national attention by the efficiency and vigor of his conduct of the office, which he developed according to high professional standards. His warfare on the gunmen and gamblers, and his fearless handling of the cases involving police corruption were a notable part of his work for law enforcement. He personally investigated and tried the more difficult cases, and secured convictions which met with widespread approbation.

In the fall of 1913 he was re-elected District Attorney for another four year term, with the combined endorsement and support of both the Republican and Democratic organizations of the City.

After serving a total of five years as District Attorney he was elected to the Governorship of New York in 1914, and was re-elected to the Governorship in 1916, his second term ending December 31, 1918. As War Governor of New York, he entered energetically into all of the preparations to put the men and resources of the Empire State at the disposal of the Nation, in time to be of the maximum service. Governor Whitman cooperated closely with the Bar Associations throughout his two terms as Governor, and his judicial appointments won general commendation as of the highest character.

Upon retiring from the Governorship, Mr. Whitman returned to the practice of law, in general practice as a member of the firm of Whitman, Ottinger and Ransom, now the firm of Whitman, Ottinger, Ransom, Coulson & Goetz, with offices at No. 120 Broadway, New York City. He has since devoted himself to his profession with the same energy and zeal which he had displayed in public office.

Mr. Whitman has long been a member of the New York City, County and State Bar Associations, as well as of the American Bar Association, and has served on many of their important committees. He represented the State of New York on the General Council of the American Bar Association, and has just completed three years of industrious service on the Executive Committee of the American Bar Association. He was a member, and later the chairman, of the Association's Special Committee on Law Enforcement, which made notable studies in the United States and abroad and presented a report which remains a useful source of material and constructive recommendations in this vital field. As a member of the Executive Committee, he has served on several sub-committees which have been perfecting the headquarters organization and routines of the Association work.

Mr. Whitman is a member of the University, Metropolitan, Union League, Century, City, Army and Navy, Bankers', Downtown, National Republican, Republican, Amherst, Sleepy Hollow, and Newport Country Clubs, and of the Masons, Elks, the Order of the Cincinnati, Sons of the Revolution, Sons of the American Revolution, Colonial Wars, St. Nicholas Society, New England Society, and the New York Society of Military and Naval Officers of the World War, and is a member of the Alpha Delta Phi Fraternity.

Mr. Whitman was married to Miss Olive Hitchcock in 1908. Their children are Miss Olive Whitman and Charles S. Whitman, Jr. Mrs. Whitman died on May 29th of this year. Mr. Whitman resides at No. 54 East 83rd Street, New York City, and his summer home for many years has been at Newport.

As a lawyer and leader of men, Mr. Whitman's work has been characterized by a great deal of common sense, fairness, appreciation of the differing points of view of his adversaries, and fidelity to the progressive functions of the Bar. If he can, during the coming year, help to interpret the American Bar Association to the men and women of America, and can cooperate in giving a genuinely democratic and useful administration of the Association's affairs, he will fulfill his own primary objectives in the Association work, through the position of great honor and responsibility to which he has been unanimously elected.

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CHARLES S. WHITMAN

President of the American Bar Association

ASSOCIATION'S WORK AT DENVER SUMMARIZED

ADOPTED Amendments to Constitution and By-Laws clearly defining the sphere of the various committees; creating Standing Committees on "Commerce," "Commercial Law and Bankruptcy," and "Air Law"; providing for conference between the Association's Committees and the Conference of Commissioners on Uniform State Laws under certain circumstances; authorizing action on the recommendation of a Section or the Conference of Commissioners on Uniform State Laws at a meeting of the Association following or contemporaneous with meeting of the Section or Conference.

Created a Section of Mineral Law.

Located Permanent Headquarters of Association at Chicago, the Treasurer's office, however, to be continued at present salary and present location.

Commended organization of the American Legislators' Association as a "legitimate and constructive effort to assist the legislatures of the various states in the performance of their duties."

Elected Simeon E. Baldwin of Connecticut, Alfred Hemenway of Massachusetts and Francis Rawle of Pennsylvania, the three surviving members of the Conference at which the Association was organized in 1878, as life members of the Association, without dues, and invited them to attend the fiftieth annual meeting as guests of the Association.

Approved and recommended for enactment H. R. 6248, 69th Congress, being a Bill to Protect Trademarks, etc.; also H. R. 12368, Amending the Statutes as to Procedure in Patent Office and in Courts, etc., and H. R. 11840, Amending Section 129 of Judicial Code.

Approved following Acts submitted by Conference of Commissioners on Uniform State Laws: Uniform Tax Lien Registration Act; Uniform Chattel Mortgage Act; Uniform Act to Regulate Sale and Possession of Firearms; Uniform Act for Extradition of Persons Charged with Crime; Uniform Motor Vehicle Registration Act; Uniform Motor Vehicle Anti-Theft Act; Uniform Motor Vehicle Operators' and Chauffeurs' License Act; Uniform Act Regulating Operation of Vehicles on Highways. The last four constitute what is called the Uniform Motor Vehicle Code.

Reaffirmed its approval and urged on Congress the enactment of "An Act Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce" (S. 2792, H. R.8944, 69th Cong.); approved Bill "Relating to Carriage of Goods by Sea" (H. R. 11477, 68th Cong.); approved proposed Bill "providing for payment of interest on judgments rendered against the United States for money due on contracts."

Instructed Committee on Jurisprudence and Law Reform to oppose Caraway Bill or any similar measure to abridge powers of U. S. Judges in conduct of Jury Trials; also to continue to promote passage of measures heretofore approved, as follows: providing for Declaratory Judgments: providing for appointment of Official Stenographers in Federal Courts; relating to Loss of Civil Rights by defendants on conviction of minor offense; relating to Reviews on Appeal; relating to Protection of Aliens in Treaty Rights; and the Uniform Procedure Bill.

Approved S. B. 2858, 69th Cong., fixing salaries of Federal Judges, and instructed committee on this subject to promote the passage of this or like legislation.

Urged support of S. B. 477 and H. R. 419, the Uniform Procedure Bill, by Association members and by state and local Bar Associations.

Authorized and directed President of the Association to comply with request of Director of U. S. Veterans Bureau and nominate members of the Association for appointment by the Director as an Advisory Council for the U. S. Veterans Bureau and its Director on all legal questions connected with guardianship of the insane and minor wards of the government.

Approved H. R. 9174, providing for biennial index of the session laws of the various states and a digest of important legislation, and urged its immediate passage by Congress.

Authorized President to appoint an auxiliary committee of one member from each State to act in conjunction with Committee on Change of Date of Presidential Inauguration in matter of ratification when and if proposed Constitutional Amendment is submitted.

Authorized Air Law Committee to tender its services to the Secretary of Commerce to assist in drafting regulations under Air Commerce Act of 1926.

Passed resolution that Committee on Insurance Law furnish copies of printed draft of proposed Code of Insurance Regulatory Law to various bodies and that revised draft be submitted to annual meeting in 1927.

Passed resolutions of thanks to the Denver Bar Association, the Colorado Bar Association, and the ladies of members, for their hospitality during annual meeting; also thanked the Boy Scouts who had been of such assistance on this occasion.

Approved plan to afford members opportunity to purchase at cost copies of the Annotated Code of Ethics, prepared by Chairman Boston of the Special Committee on Supplementing the Canons of Ethics, for use of that committee.

DENVER MEETING OF ASSOCIATION BREAKS ALL ATTENDANCE RECORDS

Over Twenty-One Hundred Members Register—Members of Families Accompanying Delegates Probably Equal in Number—Hearty Welcome and Efficient Prparation of Denver and Colorado Bars—Procedural Reform Is Keynote of Remarkable Meeting—Large Audiences Greet Speakers at Every Session—President Long Maps Out Lines for Further Advance of American Bar—Section of Mineral Law Created—Other Important Business Transacted—Unbounded Hospitality of Hosts

THE Forty-ninth Annual Meeting of the American Bar Association will remain long in the memories of those who attended it. The program there presented was full of interest, variety and instruction, and the work accomplished was of substantial character. The attendance broke all previous records, over twenty-one hundred members, many of them accompanied by their ladies and other members of their families, being present. The hospitality extended by the Colorado lawyers added a memorable chapter to those which already adorn the history of the Association. Moreover, it was at Denver that the announcement was made that the Association itself had broken its own record for numbers by going over the twenty-five thousand mark.

Action was the major theme of the meeting. The need of it was brought out in nearly all addresses and discussions. American lawyers were assembled to take counsel and gird themselves for the discharge of the responsibilities of the profession to the public and to itself. The program was plainly not devised for purposes of mental relaxation or of too great encouragement of professional self-satisfaction. Much had been done but much remained to be done.

President Long sounded the keynote of almost the entire public program when he outlined present conditions as to criminal law enforcement and judicial procedure, proposed remedies which have already stood the test of experience elsewhere, and called on the American Bar to take the lead in a movement to have these remedies applied. The symposium on the "Enforcement of the Criminal Law" and that on "Greater Efficiency in Judicial Procedure" were variations of this all-important central theme. Mr. Dubbs' absorbing story of "The Unfolding of Law in the Mountain Regions," was a challenge to the present from an epic past to press forward with new achievement. Mr. Norton's address on "National Encroachments and State Aggressions" was a worth-while warning of tendencies in government which lawyers are peculiarly fitted to understand.

Finally, Mr. Duncan Campbell Lee's address on "Recent Changes in English Law of Property" fitted in excellently with the main theme of the meeting, for it was a striking reminder of the willingness of an old and conservative nation to make changes where they are plainly needed. Mr. James M. Beck's address on "The Future of Democratic Institutions" was stimulating and suggestive, political rather than legal in its point of view, but it may well be added that the future of Democratic Institutions is a subject closely allied to that of an improved and effective administration of justice.

In a series of business sessions, the Association reaffirmed its support of fundamental principles by again instructing its committee to oppose the Caraway Bill or any other measure to abridge the powers of United States judges in the conduct of jury trials. It recommended for congressional enactment a number of measures which have been under the consideration of its committees for longer or shorter periods—among them the bill to give the U. S. Supreme Court the same power to make rules on the law side of the federal courts that it now has on the equity side and the bill increasing the salaries of federal judges. It also approved an unusually large number of proposed uniform Acts submitted by the conference of Commissioners on Uniform State Laws, among them the Uniform Motor Vehicle Code which deals with a subject of growing importance.

The election of Mr. Francis Rawle, Mr. Alfred Hemenway and Judge Simeon E. Baldwin to life membership, and the invitation to them to attend the fiftieth annual meeting as guests of the Association, were graceful acts expressive of a genuine appreciation of the labors of those who founded the organization and helped bring it to its present state of usefulness. Establishment of the permanent headquarters at Chicago was a step dictated by obvious considerations of convenience and economy. The Treasurer's office, however, will remain in its present location and at its present salary.

Among the most important things done, from an organization standpoint, was the adoption of Amendments to Constitution and By-Laws, which clarify the spheres of the various committees and guard against the over-lapping jurisdictions which have caused so much debate in the past. The basis of the action of the Association was the report of the sub-committee on Scope and Plan, as amended by the Executive Committee. The report of the sub-committee, of which Mr. Frederick A. Brown was chairman, was published in full in the May issue of the JOURNAL. The Secretary's office will soon print a pamphlet giving the constitution and by-laws as finally adopted and they will, of course, appear in the forthcoming Annual Report. A dying echo of the friendly contest in the matter of jurisdiction which has long been waged between the old Committee on Commerce, Trade and Com-

mercial Law and the Association's Committee on Uniform State Laws, which committee is headed, ex-officio, by the Chairman of the Conference of Commissioners on Uniform State Laws, came up on the report of the former committee. However, the issue was quickly settled.

The Sections held their meetings and the reports made by their chairmen to the regular sessions of the convention showed that the addresses were of a high order and the attendance generally good. Another section, that of Mineral Law, will date from the Denver meeting, the demand for an agency of this character coming from many sources. The organization of a new section from time to time is sufficient evidence that those in existence have proved their worth beyond all question.

The entertainment program, as prepared by the Colorado lawyers, was of notable interest and variety. A mere chronicle of the good things provided for the visitors is sufficiently imposing, but it fails to convey anything like an adequate idea of the hospitality and personal cordiality behind it all. It is this which escapes all efforts to reduce to writing, but which nevertheless constitutes the most important part of a series of unusually agreeable experiences. The Colorado lawyers and their ladies constituted themselves a committee of the whole on entertainment and nothing that could be suggested for the satisfaction or pleasure of their visitors was overlooked.

They took the members up to the mountains, on wonderful excursions of one and two days' duration, and showed them all the wonders of Colorado scenery. They saw that the golfer had his golf and the fisherman a fair chance at his mountain trout —it having been discovered that these diversions and the serious business of the meeting are not altogether incompatible. There were garden parties for members and their ladies at the country clubs, a special party for the children of the visitors, and there was a banquet for the ladies on the same night as the annual banquet of the Association. Arrangements everywhere were perfect and all the functions were greatly enjoyed.

Hon. J. Grafton Rogers was chairman of the special committee to make arrangements for the meeting and he was ably assisted by his fellow members, as well as other representatives of the Colorado Bar. Among the other names which call for special mention in connection with the local preparations for one of the most successful meetings in the Association's entire history are Mr. Henry McAllister, general vice-chairman of the committee on arrangements, and Messrs. Tyson S. Dines, Horace N. Hawkins, Robert L. Stearns, Erl H. Ellis, Wilbur F. Denious, Stanley T. Wallbank, Clayton C. Dorsey, Morrison Shafroth, Myles P. Tallmadge, Kenneth W. Robinson, Elmer L. Brock, Hugh McLean, and Misses Maybelle Carter and Mary F. Lathrop, all of whom were connected with the committee. Nor should this enumeration be construed as a failure to recognize gratefully all that so many other Colorado lawyers and their ladies did for the comfort and entertainment of visiting members.

The annual banquet of the Association was held in the Auditorium and was a successful end to a great meeting. The building was beautifully decorated for the occasion. The members were received in what may be called the theatre end of the structure, where they seated themselves comfortably to await events. Most of them doubtless wondered where the banquet was to be, as there was no evidence of anything of the sort in sight. But as they sat looking at the curtained stage, the curtains slowly drew apart, revealing an immense vista of tables and the light and decorations. The effect was striking. The visitors passed through the stage to the immense banqueting hall on the other side, where another demonstration of Denver's mastery of the technique of entertainment was afforded.

After the banquet was over, President Long introduced the first speaker, Mr. Henry McAllister, who represented the Colorado Bar and made a speech full of wit and humor. As the speaking proceeded, the hearers became more and more convinced that President Long's preliminary statement that they had all been carefully hand-picked on account of their post-prandial records was entirely accurate. Probably no more entertaining group of after-dinner speakers could be found in the country, and certainly no American Bar Association banquet has seen their efforts excelled. Mr. McAllister was followed by Hon. F. Dumont Smith, Judge W. Lee Estes, of Texarkana, Tex., and Mr. Eugene H. Angert of the St. Louis Bar, all of whom made addresses that were greatly enjoyed. Sir James Aikins, president of the Canadian Bar Association, followed with a characteristically happy effort, and Mr. Harvey T. Harrison of Little Rock, Ark., made a unique humorous talk that kept everyone smiling.

At the conclusion of the addresses, President Long introduced Hon. Charles S. Whitman, the new President, who was liberally applauded. He spoke briefly, paying a graceful tribute to the retiring president and to the men and women of Colorado who had helped make the meeting such a memorable event, and then declared it adjourned sine die.

First Session

PRESIDENT LONG called the first session of the forty-ninth annual meeting to order in the Denver Auditorium at ten o'clock a. m. on July 14. An immense audience composed of members and their ladies and citizens of Denver greeted him with applause as he assumed the gavel. He thereupon introduced Judge Charles C. Butler, President of the Denver Bar Association, who welcomed the Association on behalf of the local organization, as follows:

"Mr. President and Members of the American Bar Association: Mr. Rogers will welcome you on behalf of the Colorado Bar. The honor of greeting you on behalf of the Denver Bar has been conferred upon me.

"The news telegraphed last winter that Denver had been selected as your meeting place this year was received by us with genuine pleasure and rejoicing. During her fifty years of statehood Colorado has entertained many notable guests, but none has she received more gladly, none more proudly than The American Bar Association; and Denver, the capital city, feels deeply the honor of having

within her gates so distinguished a body. May your stay be filled with profit and pleasure.

"In the mountains over yonder are great crevasses or seams in the earth in which are deposited the precious metals. But there also are to be found mica and other substances that shine and glitter and make a fine display, and these are sometimes mistaken for pure gold. Is not something akin to this true of the profession of the law? Are not some of us at times misled by glittering, but false, doctrines so arrayed as to resemble truth and justice?

"May we, in our deliberations, be given wisdom to select the true and reject the false, to the end that the former may be crystalized into law and the latter cast into the limbo of forgotten things.

"We Coloradans love the mountains. It is inspiring to climb to the summit of some snow-crowned monarch of the range and enjoy the superb view—peak after peak, as far as the eye can reach; great plains stretching far to the east; beautiful lakes with water clear as crystal; fertile parks and valleys; deep canyons; rushing streams. And when we behold these wonders we pity those who are so intent upon discovering some trifling inequality in the surface of the plains that they fail to see the towering peaks beyond.

"So in our profession there are those who are so absorbed in dotting each and every 'i' and in crossing each and every 't' and in preparing and delivering tedious arguments attacking some trifling, unimportant defect in their adversary's pleadings that the great, outstanding principles of law and justice are wholly beyond their ken. Such persons would have their vision broadened if they became members of the American Bar Association.

"At this meeting we expect to lay aside trivial things, and hand in hand with you ascend the steep slopes of the law and view the vast field of jurisprudence.

"We hope that you will not leave without seeing more of our state. Here nature, not content with filling the parks and valleys with the kindly fruits of the earth, has bestowed her treasures of gold and silver with so lavish a hand that she had to pile up mountains to hold them all.

"Welcome to Colorado, the Centennial State. Welcome to Denver, the Queen City of the Plains, the present capital of this fair state, the future capital of the United States!"

Mr. Rogers Welcomes Association

At the conclusion of Judge Butler's welcome, which was greeted with applause, President Long introduced James Grafton Rogers, President of the Colorado Bar Association, who welcomed the visitors on behalf of that organization:

"Mr. President and My Fellow Members: Words of welcome should be appropriate and few, and I shall try to conform at least to the last of these two qualifications. The members of the Colorado bar have never been more keenly interested, more keenly united, in any project in their history than they have been in the problem of entertaining you here this summer. We have had endless resources in the way of energy and funds to entertain you. We have devoted all the time that the matter seemed to require or suggest, to your entertainment. If we fail this week in extending to you the hand of fraternity, it is not because we have not had the means or energy to devote to the problem, but that we have falsely planned or that the weather man deserts us.

"Formal words of welcome naturally take some form of self-glorification. I am not anxious to glorify Colorado or the Colorado bar today, but rather to glorify you. The real welcome that you will find is in the hands, in the faces, in the presence, in the activities of the members of the Colorado bar, who, I trust, will surround you and accompany you through this week. We will try to leave things in such form that you will be reluctant to go home.

"However, there is one word that I ought to say confidentially between ourselves, as a Colorado lawyer to our visitors. The profession of the law is vastly overcrowded in Colorado. (Laughter.) If any of you care to pursue such profitable occupations as bricklayers or automobile mechanics, we will welcome you. But if any of you, while desiring to stay in Colorado, still have some idea that you would like to practice law, we have a committee appointed on that subject who would like to interview you and perhaps provide return tickets. (Laughter.)

"For a week, however, we are your abject hosts; for a week, command us and we are at your service; for a week, if Denver does not do her duty, and Colorado does not do her duty, she will betray her proudest traditions. Thank you." (Applause.)

President Long's Response

President Long responded. He alluded to the fact that the Association was by no means a stranger to Denver. Twenty-five years ago it had held its meeting in that city. At that time three hundred and six members were registered, as compared with over sixteen hundred that had already registered for the present meeting, with the probability that the total final registration would exceed that of even the meeting at Detroit. He added, amid applause, that while the Association was small in numbers twenty-five years ago, on the day previous it had passed the 25,000 mark in membership.

There was still another relationship between the American Bar Association and the Colorado Bar Association growing out of the meeting in 1901. The silver bands which adorned the gavel which he held in his hand had been presented by the Colorado Association to the American Bar Association. The Coloradans had noticed it in its unadorned state at the meeting in 1901 and thereupon had determined to adorn it with virgin silver from their own mines.

"On these bands," he continued, "are the names of the forty-eight presidents of this Association. That gavel (holding it up) was used by David Dudley Field, a president of this Association who, prior to that time, had led the reform of procedure in this country seventy-five years ago. It also was used by his great antagonist in that conflict, James C. Carter, another president of this Association. That gavel was used by John F. Dillon, one of the noted lawyers of this country. It was used by Simeon E. Baldwin, governor of Connecticut, Chief Justice of that state, and one of the original organizers of this Association. It was used by U. M. Rose, who was elected at the Denver meeting twenty-five years ago, and whose statue now stands

in Statuary Hall in Washington—stands there representing a great lawyer.

"I am not going to reflect on those lawyers or those presidents whom I do not name, but I want to call your attention to some significant things about former presidents of this Association. That gavel was used by Elihu Root, the leading lawyer in this country and head of the American Bar. (Applause.) That gavel was used by William Howard Taft (applause), the only man in the history of this country who has been at the head of the two great departments of government, the executive and the judicial. (Applause.) And he was president of this Association after he was president of the United States. That gavel was used by three former presidents who came very near or might have been presidents of the United States—Alton B. Parker, who died this last year, John W. Davis, and Charles E. Hughes. (Applause.)

"The point is this: Considering this gavel and considering the history that goes with it, this Association is closely related to the Colorado Bar Association, and we are here again with you for this, the forty-ninth session. We appreciate the welcome that you have given us; we appreciate the opportunity that you have given us of accepting your invitation to meet once more in Denver. We believe it will be one of the great meetings of this Association, and we are going, as best we can, to conduct the business here in such way and in such manner as to command the respect of those who may be present at our meetings.

"And now, without any further comment or response, I wish to call to preside over this meeting during the time that I shall deliver the Annual Address, Francis Rawle, of Philadelphia, Pennsylvania. Mr. Rawle was treasurer of this Association for twenty-four years, and, as I said, bought this gavel in that capacity. He was also president of the Association. He is one of the three living men who have been continuously members of this Association since its organization (applause)—Governor Baldwin of Connecticut, Mr. Hemenway of Boston, and Mr. Rawle." (Applause.)

"Advance of the American Bar"

President Long then proceeded to deliver his address, which was listened to with close attention. His subject was "The Advance of the American Bar," and he not only summed up briefly and cogently the forward steps that have already been taken but outlined the main lines for a further advance by the bar of the country. Procedure must be simplified, legislative shackles must be removed from the courts, the profession must assume responsibility for securing action. Situations varied in the different states, but the main outlines of the remedies to be applied could readily be given. Then there was the further duty of discussing our organic law. Two issues were arising with which that instrument was vitally concerned: the preservation of individual liberty and the maintenance of local self-government under the constitution.

He concluded with a note of challenge and of confident assurance: "The battle against Intolerance is on. The Freedom of Learning is in peril. The American Bar should take part in this contest. The forces are gathering to preserve liberty of opinion; liberty of the teacher to teach; liberty of the child to learn; and local self-government. The advance of the American Bar in the preservation of the liberty of man, woman and child is very reassuring. Let us hope as the organized Bar increases in members, power and influence that the blessings of liberty and of local self-government may be made more secure to ourselves and our posterity." (Applause.)

On President Long's resuming the chair at the conclusion of his address, Judge Charles D. Butler presented a telegram which had just been received from the Sons of the American Revolution extending greetings to the American Bar Association and saying that they recognized its leadership in the promotion of Americanism.

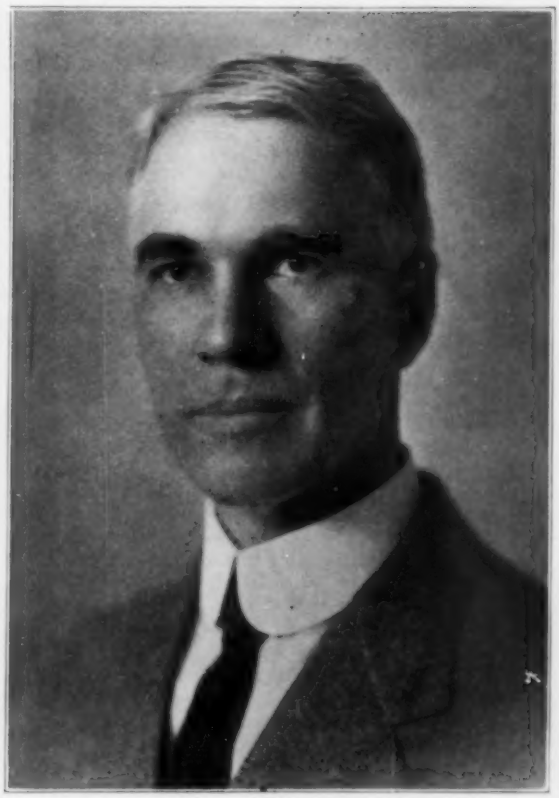
Chief Justice Marshall of Ohio then took the floor and with a few brief remarks presented for the approval of the Association a telegram to Chief Justice Taft expressing the regret of the Association at his inability to attend the forty-ninth annual meeting, and also voicing sincere appreciation of the active interest that he had taken in it in the past and hope for continuation for many years of his useful services both to the state and the nation. This was unanimously adopted. Thereupon Mr. Platt Rogers, of Denver, presented for approval a telegram to Treasurer Frederick E. Wadhams, conveying appreciation of his twenty-four years loyal service as Treasurer, regretting that temporary physical incapacity prevented his attendance at this meeting, and expressing the hope that he might speedily regain strength and be with them at the Fiftieth annual meeting.

Reports of Secretary and Treasurer

Secretary William P. MacCracken, Jr., then read his annual report. Adequate quarters both for the Secretary's office and for the Journal had been secured with the approval of the Executive Committee, under authority granted the sub-committee on Survey of Operations. The volume of work carried on by the Secretary's office during the past year had probably been greater in extent and larger in scope than ever before in the Association's history. The 1925 Report had exceeded all previous ones in the number of pages, and requests for copies of it from agencies outside the legal profession had been greater than ever before. This indicated an increasing public interest in the work being done by the Association as a whole and by its subsidiary bodies and committees.

It had been found necessary to print several editions of the address "Liberty and Law," delivered by President Hughes at the Detroit meeting, and thousands of these pamphlets had been distributed to individuals, schools, clubs, religious organizations and fraternal bodies. Other addresses delivered at the Detroit meeting, notably those before the Section of Criminal Law, copies of former Reports, the Canons of Ethics, and literature prepared by the Section of Legal Education and the committees on Law Enforcement and American Citizenship had also been in great demand. During the course of the past ten months the Secretary had attended ten meetings of state and local bar associations at which the work of the American Bar Association was presented. In addition to the travel involved at attendance at these meetings, he had made several trips to Washington in connection

JAMES GRAFTON ROGERS
Who welcomed Association for Colorado Bar



HON. CHARLES C. BUTLER
Who welcomed Association for Denver Bar

with legislative matters pending before Congress in which the Association was interested.

In the absence of Treasurer Wadhams, Secretary MacCracken read a summary of his report. This showed total receipts, $199,817.32; total disbursements, $167,188.72; cash on hand June 21, 1926, $32,628.60. The report also showed under the head of "Funds Invested," in United States Government and railroad bonds, the sum of $34,568.75.

Executive Committee's Recommendations

Secretary MacCracken then presented the report of the Executive Committee, detailing the activities of that body since the last meeting, recommending that certain proposed amendments to the Constitution and By-Laws be adopted, and submitting for the approval of the Association the report of the committee on Survey of Operations, with its recommendation that "permanent headquarters of the American Bar Association be located in Chicago; that the office of the Treasurer be continued at the present salary in the present location, that the records and files of the Association, and the mailing and addressing facilities be moved to and kept in the Association's headquarters in Chicago; that notices to members with reference to dues shall be sent from headquarters, and that dues shall be paid there, such dues to be turned over by the Secretary to the Treasurer, as custodian of the funds of the Association."

The proposed amendments submitted in the committee's report were those which had been presented by the Committee on Scope and Plan and printed previously to the meeting of the Association, with certain changes which had been adopted by the Executive Committee itself. These changes were for the purpose of clarifying certain provisions relating to the authority of the committees. The Executive Committee's report also stated that during the past session of Congress two important bills sponsored by the Association, namely, the Air Commerce Act of 1926, and the United States Code, were passed by Congress and approved by the President, while substantial progress had been made toward the passage of several other bills sponsored by the Association, namely, the bills providing for an increase in judicial salaries, for the incorporation of the American Bar Association, for additional federal judges, the uniform procedural bill, etc.

The Executive Committee's report also recommended a resolution to the effect that "the American Bar Association commends the organization of the American Legislators' Association as a legitimate and constructive effort to assist the Legislatures of the various states in the efficient performance of their work;" announced that the Publications Committees had been authorized to provide for the printing and sale without profit of the Annotated Canons of Ethics, prepared by Charles A. Boston; announced the resignation of Mr. Edward T. Fell as Assistant Secretary and the filling of the vacancy by the election of Mr. Richard Bentley; and concluded with an expression of regret at the recent death of former president Alton B. Parker.

At the conclusion of the report President Long called attention to the fact that the recommenda-

tions in regard to the Constitution and By-Laws required the presence of two hundred members for action and a three-fourths vote in order to adopt. He thereupon suggested that a vote first be taken on the other part of the report of the Executive Committee, which required a simple majority. This was done and this part of the report was adopted without objection.

Proposed Amendment Criticized

Judge Goodwin, of Illinois, thereupon suggested a separate vote on the proposed amendment to Article IX, which added thereto a paragraph reading as follows: "Whenever a committee is considering any subject respecting proposed state legislation it shall confer with the National Conference of Commissioners on Uniform State Laws;" also a separate vote on the proposed amendment to Art. XII which inserted a similar provision as to sections.

His objection to the amendment was that it was impracticable. If it should come to a point where a committee or section was suggesting a bill or recommending a bill for passage, at the time such a measure was formulated, of course the committee or section should confer with the Commissioners on Uniform State Laws; but the point he made was that if you went down through the individual committees you would find that almost all the subjects which each of them was empowered to deal with was related in some way to state legislation. In other words, the language was entirely too broad. It would require every committee considering any subject respecting state legislation to confer with the National Conference of Commissioners on Uniform State Laws, whether the subject was in a situation where any good could result from that kind of a conference or not. He moved an amendment to the effect that there should be such a conference whenever a committee was considering a subject and proposed to recommend state legislation or the Commissioners on Uniform State Laws proposed a definite state statute.

Judge Hargest, for the Executive Committee, replied that the amendment proposed by Judge Goodwin would be unfortunate because it provided only for a conference when the section or committee proposed state legislation. The object of the amendment was to secure a conference before any section or committee of the Association had done a lot of work on state legislation. It was to prevent just such a thing as had happened last year at Detroit, when the Association had apparently adopted a view as to arbitration entirely in conflict with that adopted by the National Conference of Commissioners after years of service, and later, after considerable debate, reversed itself in principle. He thought the language was workable and the amendment as a whole as originally proposed should be adopted. After some further discussion Judge Goodwin's amendment was rejected and the report of the Executive Committee as to the amendments to the Constitution and By-Laws was adopted in toto.

Secretary MacCracken then presented a list of 291 applicants for membership, which was approved; also a cordial letter of greeting from the Kiwanis Club of Denver, which was received and filed. The chair then recognized Charles Henry Butler, of Maine, who offered a resolution electing Simeon E. Baldwin, of Connecticut, Alfred Hemenway, of Massachusetts, and Francis Rawle, of Pennsylvania, the three surviving members of the Conference held at Saratoga, New York, in August, 1878, at which the American Bar Association was founded, honorary life members of the Association and inviting them to attend the fiftieth annual meeting as its honored guests. This was referred to the Executive Committee.

Second Session

The second session was a joint session of the American Bar Association and the Colorado State Bar Association. President Long called the meeting to order and introduced James Grafton Rogers, President of the Colorado Bar Association, as the presiding officer. Chairman Rogers stated that the meeting was almost the Fiftieth Anniversary of the admission of Colorado to the Union and it was thought appropriate that there should be presented some reference to the historical background of the territory in which the American Bar Association was holding its annual meeting. He then introduced Mr. Henry A. Dubbs, former President of the Colorado State Bar Association, and now president of the State Historical Society, who spoke on "The Unfolding of Law in the Mountain Region."

Mr. Dubb's address was listened to with much interest. The absorbing phenomenon to lawyers of a system of law in the making was treated in its historical aspects, by the speaker in a thorough and attractive manner. Early voluntary organizations for maintaining law in the mining camps, mining regulations, the People's Courts in the valleys, territorial organization, adoption of the common law "with reservations," development of rules at variance with the common law, due to local conditions and necessities—these and many cognate subjects were the points of interest on the historico-legal excursion on which the speaker took his audience.

At its conclusion Mr. John A. Cline, of Ohio, announced the unfortunate death of Mr. Shirley H. Tolles, of Cleveland, who had suddenly passed away while attending the annual meeting at Denver, and proposed that a resolution of sympathy be sent to his son. The motion was carried unanimously.

"Enforcement of the Criminal Law"

Chairman Rogers then announced that one of the subjects attracting attention at the present time was that of reform in criminal procedure and the general enforcement of criminal law. There would be a discussion of that subject at this meeting, participated in by several speakers. He then introduced the first speaker, Hon. Guy A. Thompson, of St. Louis, former President of the Missouri State Bar Association, and President of the organization which has recently made a thorough investigation of the situation in Missouri, who spoke on the "Missouri Crime Survey." The audience was greatly interested in his account of the methods and results of this undertaking, which has attracted national attention. He was followed by Mayor Dever, of Chicago, who spoke on "Law Enforcement in a Great American City." Mayor Dever's temperate appeal for a better understanding of the facts of the situation with regard to enforcement

(*Continued on page 560*)

THE FUTURE OF DEMOCRATIC INSTITUTIONS

Declaration of Independence Remains the Classic Definition of Democracy—At Low Ebb Today as Form of Government but at High Tide as a Social Spirit—Ponderables and Imponderables of Democratic Institutions—Only System Consistent With Self-Respect in Age of Education—Menaces to Perpetuity*

By Hon. James M. Beck
Former Solicitor General of the United States

MR. PRESIDENT and Gentlemen of the American Bar Association: We hold this year our annual meeting at an auspicious time. It is an anniversary period of great and heroic memories. Ten days ago the Republic, with the joyous **io triomphe** of a great people, celebrated the one hundred and fiftieth anniversary of the adoption of the Declaration of Independence.

Today we can recall another great memory, which is inseparably connected with the great Declaration. Tonight, one hundred and thirty-seven years ago, the Duke de Liancourt obtained access to the bedroom of Louis the XVI and told that ill-fated monarch of the seizure and destruction that day of the Bastile by a long-oppressed and outraged people. The startled King said: "Why, it is a revolt!" and Liancourt prophetically exclaimed, "No, Sire; it is a revolution."

It was a revolution which was not local either to France or to America. Humanity was in labor and freedom was about to be born for all mankind.

It would be strange, indeed, if the American Bar Association did not take note of these anniversaries and it is this consideration that has prompted the selection of my subject, "The Future of Democracy," in response to your gracious invitation to address you. No class can take a more peculiar interest, or feel a greater sense of pride in these world-shaking events, than our profession. Of the fifty-five signers of the Declaration of Independence, twenty-six were lawyers, and of the five hundred members of the French National Convention, three hundred and seventy were also members of our profession. Moreover, the author of the great Declaration was a young Virginia lawyer, then only in his thirty-third year.

Our deliberations would seem wanting if we did not take note in this sesqui-centennial year of the great epic of 1776, when the Fathers created a new nation and dedicated it forever to the cause of human freedom. The flame then lit on that little altar in Independence Hall still illuminates the world. To countless millions it has been as a pillar of cloud by day and a pillar of fire by night. Tom Paine was a true prophet when he said a few months before the adoption of the Declaration, in his stirring appeal, "Common Sense," that "the birthday of a new world is at hand," but he could not have realized the full truth of his prediction. Little did he or any of the Fathers appreciate that they had "lifted the gates of empires off their hinges and turned the stream of the centuries into a new channel." We can now see, in the perspective of history, that the greatest revolution in human thought and social conditions that the world has ever known and of which both the American and the French Revolutions were but incidents, was then in progress. It had begun long before 1776.

The Declaration did not create us a people. We were a great people before it was adopted. Declarations, constitutions and governments do not create peoples, but peoples create governments and ordain constitutions.

France did not begin its great career with the Fall of the Bastile, and the attempt of the French Convention to revise chronology by declaring the date of its constitution the year "One," proved abortive. Similarly, the American Commonwealth antedated the United Colonies and, later, the United States of America. It began with the landing of the first English pioneers upon the coasts of Virginia.

As such, the American Republic is the noble child of the greatest revolution in human thought of an earlier age, namely, the Renaissance. It was born in the "spacious days of Queen Elizabeth" and came into being through the same great impulse that gave to the world Frobisher and Raleigh, Drake and Spencer, Sidney and Coke, Bacon and Shakespeare. Never did human imagination rise to greater heights, and the finest flower of its genius was the birth of democracy in the new world, of which the American Revolution was but a single, although a very noble, chapter. Of Plymouth Rock, which shares the glory with the shores of Virginia of the great adventure, a New England poet has well said:

Here on this rock, and on this sterile soil,
Began the kingdom, not of kings, but men;
Began the making of the world again.
Here centuries sank, and from the hither brink,
A new world reached and raised an old world link,
When English hands, by wider vision taught,
And here revived, in spite of sword and stake,
Their ancient freedom of the Wapentake.
Here struck the seed—the Pilgrims' roofless town,
Where equal rights and equal bonds were set;
Where all the people, equal-franchised, met;
Where doom was writ of privilege and crown;
Where human breath blew all the idols down;
Where crests were naught, where vulture flags were furled,
And common men began to own the world!

In the Eighteenth Century, humanity was in labor, and of that mighty travail a twin birth resulted. One was industrial and the other was spiritual; one, the birth of the machine and the other, the birth of democracy. Twin children are not more inseparably united. While heroic souls in England, France and America were valorously fighting for greater freedom for the masses, Watt

*Address delivered on July 14 at the 49th Annual Meeting of the American Bar Association, at Denver, Colo., July 14-16.

was developing his steam engine and Ramsey and Fitch were applying it to transportation. The dynamic power of man was about to be increased a thousand-fold. The day was coming when he would out-fly the eagle in the air, out-swim the fish beneath the surface of the waters, and speak with the rapidity of light itself. Like Prometheus, man was about to storm the hitherto inaccessible ramparts of divine power, and, measured by dynamic strength, he was about to become a superman.

It was inevitable that such an infinite expansion of physical power should be accompanied by a struggle for greater freedom. No two facts in all history are of more tremendous and inestimable importance, or of more pregnant consequence to the future,—for good and ill,—than the seemingly indefinite expansion of man's dynamic power, and his invincible demand for the full right to pursue his own true and substantial happiness. The democracy of the hand and the democracy of the soul are, in the last analysis, but one manifestation of the same unconquerable spirit, whose ultimate claim is that man shall be in truth, as well as in theory, "master of his soul and captain of his fate."

De Tocqueville, that extraordinary keen and prophetic intellect, well said, nearly a century ago:

> The gradual development of the principle of equality is a providential fact. It has all the chief characteristics of such a fact; it is universal, it is durable, it constantly eludes all human interference, and all events as well as all men contribute to its progress.

I have said that the Declaration of Independence did not constitute us a people; it is equally true that it did not constitute us a nation. Complete sovereignty as a nation began with the first shots of the "embattled farmers" at Concord Bridge. Months before the Declaration of Independence, the colonies had, to a greater or less extent, become independent and assumed full sovereignty. The Declaration of Independence simply recognized an accomplished fact, and its purpose was not to create a new nation, but to justify its existence to the world.

This does not lessen either its dignity or nobility. On the contrary, its dominant purpose, when rightly conceived, ennobles the great Declaration and has given it its due place as one of the noblest documents in the annals of statecraft. The American nation could have contented itself either with facts that spoke more eloquently than words, or, at least, with the formal proposal of Richard Henry Lee, which had been adopted on July 2nd and which declared "That these United Colonies are, and of a right ought to be, free and independent states." This resolution had been proposed as early as June 7th by Richard Henry Lee, under instructions from the mother commonwealth of Virginia, and its passage was then so certain that on June 9th a Committee of Five was appointed to draft a declaration to the world of both the existing fact and its moral justification. This committee consisted of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert R. Livingston. To Jefferson was assigned the immortal honor of drafting the Declaration, and it is to his undying glory that that Declaration, with a few changes by Franklin and John Adams, was his inspiration.

What then was the purpose of the Declaration of Independence? As clearly set forth in its noble Preamble, it was an appeal to the conscience of the world in support of the moral justification of the Revolution. It commences, "When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . . *a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*"

Possibly no State paper ever contained a nobler sentiment than this. It is believed that there was a great human conscience, which, rising higher than the selfish interests and prejudices of nations and races, would approve that which was right and condemn that which was wrong. It constituted mankind a judge between contending nations, and, lest its judgment should temporarily err, it established posterity as a court of last resort. It placed the tie of humanity above that of nationality. It solemnly argued the righteousness of the separation at the bar of history, solemnly prefixing its statement of grievances with the words: "In proof of this, let facts be submitted to a candid world;" and finally concluded its appeal from the judgment of the moment to that of eternity, in the words: "Appealing to the Supreme Judge of the world for the rectitude of our intentions."

The great Declaration was more than an eloquent plea for the favorable judgment of the world. Another great purpose was to give to man new title papers to liberty. For thousands of years, man had lived under conditions which justly provoked the cynical remark of Rousseau, with which he began his immortal book, "man is born free and is everywhere in chains." Prior to the middle of the Eighteenth Century, the conception of the sovereignty of the people was almost unknown. Even in France, where the ideas of liberty were then germinating, the people had so little conception of their own rightful sovereignty that, thirteen years after the Declaration of Independence and at the beginning of the French Revolution, the only claim that the French people made was that they should share equally with the clergy and the nobility in the constitution of the legislative body. In 1789 that body had not been convened for over 150 years and there was thus no novelty in Louis XIV's arrogant boast, "L'etat, c'est moi." The state was conceived as a sacred institution, which existed apart from the people, and had its sanction, not in their will but in some inherent claim. In nearly every nation, the fountain-head of all power and justice was an hereditary monarch, whose power was absolute except as he graciously gave immunities to the people, which were called "liberties." Even in those nations, where the soil had been broken and the seeds of liberty implanted, the utmost claim of the masses was for some participation, by the grace of the king, in the legislative councils of the nation. A few inspired spirits, like Locke, Burlamaqui, Montesquieu and Rousseau, were suggesting the then wholly revolutionary idea that, in the origin of human society, sovereignty had originally rested with the people and that it was only by their consent, given by a mythical social contract, that the state, as a separate entity, had been created and its sovereign power vested in an hereditary king. The mighty shadow of the greatest of the Caesars still rested upon the earth.

Even the men of the Revolution, at its beginning, fully accepted this theory of government. Until the Declaration of Independence, the fore-

most spirits of the Revolution insistently claimed that they had no quarrel with the King, to whose intervention in their behalf they appealed as suppliants, but solely with the Parliament. It is noteworthy that the Declaration says nothing about the Parliament and even refrains from mentioning it by name, and that this terrific indictment was preferred against a stupid and obstinate King.

If the Declaration today gives us a quickened pulse, it is not because of the counts of the indictment against the misrule of George the Third, but because Jefferson, at heart an idealist and with all the enthusiasm of youth, challenged this universal conception as to the nature of government and asserted in eloquent phrase, the sovereignty of the people.

He drew for all mankind, without distinction to race, condition or creed, a title deed to liberty, so broad and comprehensive that "time cannot wither nor custom stale" its eternal verity. As with the blast of a mighty trumpet, the Declaration asserts that all men are created equal; that they have a right as the gift of God, and independent of government, to life, liberty, and the pursuit of happiness; that governments derive their just powers from the consent of the governed; that the people have the inherent right to alter or abolish their government when it has ceased to answer their necessities, thus constituting the people the first and only estate. These far-reaching principles satisfy the highest ideals of liberty.

By the much quoted and much misunderstood axiom, that "all men are created equal," Mr. Jefferson did not mean either a natural equality or even an equality of natural opportunity, for either would contradict the common observation of men. He was simply defining the province of government, and he was contending that all men were politically equal and that the government, therefore, should not give to any man an artificial and law-made advantage over another. "Equal and exact justice to all men, special privileges to none." When asked fifty years later and nine days before his death to write a sentiment for the forthcoming fiftieth anniversary of the Declaration—the day of jubilee on which, by a singular coincidence, he was destined to die—he wrote:

> The eyes of men are opened and opening to the rights of man. . . The mass of men are not born with saddles on their backs nor a favored few booted and spurred, ready to ride them legitimately by the grace of God.

In the noble preamble Jefferson was not attempting to discuss a form of government. The Declaration of Independence is no more a treatise on the science of government than the book of Genesis is of natural science. Jefferson's only purpose was to hold up to the imagination of men the great ideals of liberty. He was not appealing to the cold reason of men, as much as to their imagination. Many of the eloquent phrases in the preamble can be as little reconciled with existing realities as some of the Beatitudes with practical Christianity. It can be said of liberty, as George Eliot, in the great climax to Romola, finely said of justice that it "is not without us as a fact, but only within us as a great yearning."

Shortly before his death, Jefferson said:

> This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular or previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion.

Due to this fact, few, if any, political documents have more profoundly influenced the struggling masses throughout the world. It remains the classic definition of democracy, if not of liberty, and its noblest echo was the speech of Abraham Lincoln over the new-made graves at Gettysburg, when, inspired by Jefferson, he solemnly said that "government of the people by the people and for the people shall not perish from the earth."

It is no mean event, therefore, in the annals of mankind that bids us today to recall in grateful memory the great Declaration of a century and a half ago.

It would be interesting to contrast what the Declaration of Independence would have been, if Franklin, Hamilton or Marshall, instead of Jefferson, had been its draughtsman. Franklin would have restricted it to a utilitarian discussion of the practical advantage to foreign nations of assisting in the creation of a new government and thus weakening the power of the British Empire. He would have invested it with a touch of humor which would have caused the whole world to laugh. Hamilton or Marshall would have confined the Declaration to an analytical and dry-as-dust statement of the constitutional principle involved in taxing the colonies without the consent of the local legislatures. Jefferson, although a lawyer, threw away his law books and with a flaming imagination wrote the gospel of liberty. An ardent soul, his was also a great intellect. No one of his time, with the exception of Franklin, ever gave so much of a life to intellectual pursuits. From early boyhood until his latest hours, he remained the unwearying and zealous student of the great subjects which challenge the attention of the human intellect. A valued correspondent of four great colleges, the successor of Franklin as President of the American Philosophical Society, he crowned his most useful life by founding the ancient and honorable University of Virginia upon lines so broad and catholic as to anticipate many of today's most valued improvements in education. Art, music, literature, history, politics, science, agriculture, philosophy, religion, all engaged his thoughts, and when his great library, which in the days of his poverty he was compelled to sell to the government, was transported to Washington, it required sixteen wagons, and it was found that they were written in many languages and comprised in their sweep nearly every department of intellectual activity. Here was a man who could supervise a farm, draw the plans for a mansion or a public building with the detail of a capable architect, study nature like a scientist, make useful inventions, play a Mozart minuet on the violin, ride after the hounds, write a brief or manage an intricate law case, draft state papers of exceptional importance, and conduct correspondence with distinguished men in many languages upon questions

of history. law, ethics, politics, science, literature and the fine arts.

How did he, the student and recluse, become, in the apt language of one of his contemporaries, "the most delightful destroyer of dust and cobwebs that his time has even known?" I find that secret primarily in his sturdy optimism, in the fact that he believed in the work which he attempted to do, in his own ability to do it, in its significance in the predestined advancement of humanity, and in the ability and disposition of his fellow men to follow a true leader. He believed passionately in the people. In that lay his great strength.

It would be flattery of the dead to claim that Jefferson was the "Father of Democracy." "There were great men before Agamemnon" and there were great democrats long before Thomas Jefferson. The Elizabethan dramatist, Dekker, said of Christ that he was "the first of gentlemen," and it could be added that the gentle Teacher of Nazareth, who loved the plain people and sympathized with their sorrows, was the first and greatest of democrats. Jefferson was like that noble idealist of Rostand's fancy, Chanticleer. While his clarion voice, of which the great Declaration was the noblest note, did not cause the Sun of Democracy to rise, it did proclaim in the Eighteenth Century more truly than any other human note, the "reddening morn" of the present democratic era.

I am tempted, if only briefly, to discuss the more interesting question as to the present and future state of democratic institutions.

Let me disclaim any intention or ability to answer the great interrogatory that is implied in the subject of my address. Political institutions are never static, but are always in a state of flux, and who can say whither the great current is flowing?

> These changing tides which sometimes seem
> In wayward, endless course to tend,
> Are but the eddys of a mighty stream
> Which moves to its appointed end.

Let us first ask what is the present state of democratic institutions. When the greatest war of history had ended, and the roar of the last gun on the long battle line had died away in distant echoes, it seemed indeed that Jefferson's political faith had received its most impressive vindication, that "government of the people, for the people, and by the people" had been vindicated and the world had been made "safe for democracy." Not in a thousand years had there been such a dissolution of ancient forms. Crowns had fallen "thick as autumn leaves that strew the brooks of Vallambrosa." Hohenzollern had followed the Hapsburgs and Romanoffs into the night of exile. Ancient dynasties perished; kingdoms fell and empires of a thousand years vanished into thin air. Indeed, as President Wilson passed through Europe and the masses arose to acclaim him with vociferous enthusiasm, it seemed as if the existing governments of even the victorious nations were crumbling.

And then a mighty change came over the world's dream of democracy. Russia, Turkey, China, Italy, Poland, Portugal, Spain and even Greece, which gave us the very word "democracy," accepted the rule of dictators. A reaction, swift and terrible, against parliamentary government, through which alone institutional democracy can function, swept over the world like the shadow of a huge eclipse.

It is a curious paradox that this does not necessarily mean a revolt against democracy in its ultimate meanings, for a government can be democratic if it is *of* the people, even though it is not *by* the people. Mallock, in his book, "The Limits of Democracy," accuses Lincoln of tautology in speaking of government "of" and "by" the people, but such is not the fact. A people may themselves authorize a dictatorship and, if so, it as truly represents democracy in its sanction as a parliamentary majority, which too often represents the minority.

The great fact today is that while democracy as a form of government is at low ebb, as a social spirit it is at high tide. Let us not be discouraged if there is a temporary reaction against democratic parliamentary institutions. Human progress moves in a constant series of ascending and descending curves, or, to change the metaphor, its forces are at times centripetal and at time centrifugal. Man has, throughout all history, passed through a ceaseless cycles of integration and disintegration. Every age that has been marked by the concentration of power in the hands of a few has been followed by a redistribution of that power among the many and, in turn, every democratic movements, when it has spent its force, has been succeeded by a period of integration.

Take English history. The autocracy of William the Conqueror was followed by the comparative democracy of Magna Charta, and that was, in turn succeeded by the absolutism of Edward the First, only, in turn, to be supplanted by the democracy of the Peasants' Revolt. When that had spents its force, there came the absolutism of the Tudors, only to be followed by the execution of Charles the First and the democratic Commonwealth. Then came the Restoration and later the absolutism of the Georges, only to be followed by the Chartist movement, in turn succeeded by the early Victorian reaction towards absolutism. In our time democracy in England has triumphed in the virtual destruction of the political power of the Crown and the House of Lords. No country is more responsively democratic and yet last May it was on the edge of an abyss, and it seemed as if the power of the people would again be integrated into that of a class.

No present fact is more significant than the reaction in many nations against democracy and in favor of one-man power. It matters not whether the one man be called a czar, emperor, king or dictator—the essential fact is his power. Today many of the oldest nations of Europe are in the grasp of dictators. The revolt is not against democracy as a social ideal, but against the inefficiency and venality of parliamentary institutions.

At no time within the memory of living man has Lincoln's ideal of a government of and by and for the people been more openly denied and flouted.

There have not been wanting prophets who could see only the ultimate downfall of democratic institutions. Nowhere in the world has the great experiment of democracy been tried with greater promise of success than in our own favored land, and yet two of the greatest political philosophers

of the nineteenth century predicted its failure even in America. Thus Carlyle said:

> America's battle is yet to fight; and we, sorrowful though nothing doubting, will wish her strength for it. New Spiritual Pythons, plenty of them; enormous Megatherions, as ugly as were ever born of mud, loom huge and hideous out of the twilight Future of America; and she will have her own agony, and her own victory, but on other terms than she is yet quite aware of.

He shared the view of Macaulay that our fate was only deferred by the purely physical cause that we still had an abundance of cheap land, which, as long as it was available, would prevent that discontent which has hitherto proved the grave of democracies.

Macaulay, in his well-known prophecy, went further and it is well to remember who the prophet was. He was not a Tory, but a Whig. Possibly he was the most scholarly student of history of our English-speaking race. Thackeray likened his brain to the dome of the British Museum Library. Lord Melbourne once said that he wished he could be as sure of anything as Macaulay was of everything. He had an unrivaled experience as one of the great administrators and legislators of the British Empire. His prediction was made at the end of a life which had been rich in study and experience. His deliberate judgment was that "institutions purely democratic must, sooner or later, destroy liberty or civilization, or both." Speaking to Americans, he added:

> As long as you have a boundless extent of fertile and unoccupied land, your laboring population will be far more at ease than the laboring population of the old world, and, while that is the case, the Jefferson politics may continue to exist without causing any fatal calamity.

but he added that the destruction of our country would come when "North America has two hundred inhabitants to the square mile."

Nearly seventy years have passed since Macauley made this prediction, and the Republic still endures.

Nevertheless, it cannot be questioned that democratic institutions are continuously becoming more unworkable. The giant growth of our nation has put an undue strain upon its governmental machinery, and an ever-widening suffrage has made the problem of a qualified electorate ever more difficult. Even our attempted reforms, conceived in good faith, as, for example, the direct primary, have made government "of the people" and "by the people" more hazardous. The representative system is increasingly losing its strength. The complexity of our problems makes it increasingly difficult for the people to determine national policies by the simple expedient of voting for either John Doe or Richard Roe.

An even greater danger to representative government is found in the present tendency to substitute direct referendums for the deliberate action of a legislature. Let it once become a habit of the American people to refer questions of national policy to the people themselves by a referendum and democracy will break down, for referendums are impracticable for the simple reason that Lord Bacon once suggested that the average man finds it easier to give an affirmative than a negative to any proposition. Above all, the indifference of the people to their government and their absorption in materialism and pleasure leads many thoughtful men to wonder how long a people, which find more delight in the cinema and the stadium than in the duties of citizenship, will be worthy of a democratic form of government.

If there be any who believe that the Eighteenth Amendment has contributed to the political honesty of the people, or otherwise made the problem of self-government more practicable, I envy him his faith. No one can question that democratic institutions in the government of our cities has been largely a failure and the fact that our population is increasingly concentrating in the cities also gives little encouragement to the optimist.

A still more serious menace to the perpetuity of democratic institutions arises from the increased disintegration of the party system. If the present chaos in Europe, which in some countries approaches anarchy, reveals any one fact, it is that a democracy can only function through two, or at most three, political parties. Wherever there are more parties, a minority, which holds the balance of power, can impose its will, and thus the rule of the majority, which is democracy, ceases, and the rule of the minority, which means an oligarchy, begins. Germany has at least six well defined parties, and it was recently almost impossible to form a ministry. For the same reason, the procession of successive ministries in France has almost had the speed of a cinema. Briand alone has formed ten ministries within seventeen months. In England a few years ago the Labor Party, although in a minority at the polls, constituted the Government. Unquestionably, democracy everywhere is threatened by the bloc system in politics and, unfortunately, the party system cannot be insured by any form of government, but only by the political sagacity of the people. Even in America, the tendency to disintegrate into groups, or blocs, is of sinister importance. We virtually have three parties today, with subordinate blocs on minor and special issues.

Let us hope that the old-time political sagacity of the American people will recognize that if their form of government is to endure, the integrity of the party system, through which it is possible to define measurably the general will, shall be restored in all its former vigor. What would have been the history of the United States in the last century and a half if we had had a half dozen parties instead of the two great historic parties? The World War revealed, as in a vast illumination, the fact that democracy as a governmental institution is not workable, unless there be a people who are politically capable of self-government. The founders of our nation recognized this. Washington, Franklin and Hamilton all said that the success of popular government depended less upon its form than upon the moral and intellectual capacity of the people. If they fail to take an intelligent interest in their government, and if they are unprepared to show the spirit of self-restrain, which in my recent book on the Constitution I have called "constitutional morality," there can be no successful democracy. Let us not lay the "flattering unction to our souls" that we have finally and completely solved the great problem of popular government. It is still, to use the words of Lincoln, "an unfinished task," and to it the living, from generation to generation, must still dedicate themselves, for "eternal vigilance is the price of liberty."

In this connection, it must always be remembered that a democratic government, as any form

of government, is but a means to an end and not, in itself, an end. It must be judged by its fruits. It is not necessarily a final truth, but may prove to be only an inspiring prophecy. President Wilson's eloquent call to arms that "the world must be made safe for democracy," while most effective for its immediate purpose, incorrectly assumed that democracy was an end, of which the world was simply the means, whereas, in truth, the welfare of the world is the end and democracy is but the presently accepted means. Even as the greatest of all teachers said that the governmental institution of the "Sabbath was made for man and not man for the Sabbath," we can say that democracy is made for man and not man for democracy.

Our political philosophy has changed the divine right of a king to the divine right of King Demos, and one theory is as untenable as the other. The right of a majority, often mistaken, to impose its will upon the minority, who are only too often in the right, is not by divine ordinance, but is only based upon the purely utilitarian consideration that the common welfare requires a temporary subordination of the minority to the majority in the interests of peace. Law is only the reasoned adjustment of human relations and its authority consists only in its reasonableness and service to the common weal. A democracy slowly realizes this. When a majority impose upon a minority some oppressive law, which transcends the fair province of government, the minority—if they have the spirit of freemen—revolt as they would against the tyrannous edict of a King. If democratic institutions should prove more prejudicial to the common welfare than other forms of government, to it will come the stern challenge of the great Woodman, "Why cumbereth it the ground?"

Moreover, all forms of government must depend upon the character or, as Aristotle expressed it, the *"ethos"* of the people. It was well said by Lord Morley, one of the most scholarly publicists of our day, that

> the forms of government are much less important than the force behind them. Forms are only important as they leave liberty and law to awaken and control the energies of the individual man.

I fear that the founders of the Republic recognized this more clearly than we of this later generation. Even after the adoption of the Constitution,—the best form of government that the wit of man has yet devised,—Washington, on February 7, 1788, wrote that it would only be effective "as long as there shall remain any virtue in the body of the people," and on the last day of the Convention, Franklin said,

> There is no form of government but what may be a blessing to the people, if well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other.

Were Franklin alive today, he would see an extraordinary verification of his prophecy in current European developments, where great, historic peoples, who are also liberty-loving, have willingly acquiesced in the despotism of a dictator rather than endure further the incapacity of parliamentary government that will not function.

In weighing the political institutions of a democracy in the scales of a candid judgment, care must also be taken to distinguish between the ponderables and the imponderables. Judged simply on the ponderables, the judgment on democracy, as a form of government after a century and a half, would not be wholly favorable. Its inefficiency, wastefulness and, at times, venality shock the judgment. The believer in democracy is only comforted by the reflection that undemocratic governments have also been wasteful, inefficient and dishonest, and have added tyranny to these vices. Possibly the most repellant feature of democratic institutions is the coarse flattery of the mob, that, by degrading manhood, tends to destroy true leadership. With the destruction of the representative principle, the average politician becomes a mere flatterer of the many and, sometimes, even of the minority, who, under the party system, hold the balance of power. To a democratic age the spectacle is as repellant as that of the Gallery of Mirrors in the Palace of Versailles, where three thousand courtiers would crowd upon the so-called "Sun-King" to crave the servile honor of handing His Majesty his napkin at dinner. But in a democracy three hundred thousand politicians become the equally obsequious flatterers of King Demos. To flatter the many is no more creditable than to flatter a king.

When, however, the imponderables are taken into consideration, it is easier to defend democracy, for its theory satisfies the noblest aspirations of men. It not only educates them, but gives them hope. In this age of education a democracy is the only form of government that is consistent with self-respect.

Referring to that great democrat, Abraham Lincoln, Lowell finely said in his classic address on democracy:

> Democracies have likewise their finer instincts. I have seen the wisest statesman and most pregnant speaker of our generation, a man of humble birth and ungainly manners, of little culture beyond what his own genius supplied, become more absolute in power than any monarch of modern times through the reverence of his countrymen for his honesty, his wisdom, his sincerity, his faith in God and man, and the noble humane simplicity of his character.

Again, Mr. Lowell, himself an intellectual aristocrat, but a democrat by instinct, well said:

> The democratic theory is that those constitutions are likely to prove steadiest which have the broadest base, that the right to vote makes a safety-valve of every voter, and that the best way of teaching a man how to vote is to give him the chance to practice. For the question is no longer the academic one, "Is it wise to give every man the ballot?" but rather the practical one, "Is it prudent to deprive whole classes of it any longer?" It may be conjectured that it is cheaper in the long run to lift men up than to hold them down, and that the ballot in their hands is less dangerous to society than a sense of wrong in their heads.

Let us also remember that democracy is something more than a form of government—it is a great spirit. Whatever may be said in this temporary ebb-tide of democracy, as to the fate of parliamentary institutions, democracy as a social ideal is as dominating and beneficent today as it has ever been. The equality of man, properly interpreted, is still our ideal, but we mean thereby not an enforced equality, which would standardize man to the level of mediocrity, but, in its last analysis, his right to inequality. In other words, the inalienable right of man to pursue his own true and substantial happiness, as proclaimed in the

great Declaration, means his right to be unequal, for there can be no career open to talent, or any natural justice, if each man is not entitled to the fair fruits of his superior skill and industry. Social democracy asserts the right of every man to make the best of his life, and wars eternally against any form, whether it be of hereditary privilege or class legislation, that would handicap a man in the competition of life. This great conception of a "career open to talent," as Napoleon expressed it, or of "the square deal," to use Theodore Roosevelt's effective expression, remains the most dominant and vitalizing influence in life today.

To it we owe the greatness of the Republic. The ideal that every man has a right, free from governmental interference, to make of his dead self the stepping stone to a higher destiny gives to the masses that hope, which has made us the most virile nation that the world has ever known. In many other lands, a man is forever identified with his class or caste. Once a coal-miner, he and his children and his children's children can never hope to be anything else. Thus lacking an incentive to achievement, he sullenly identifies himself with his class and is deaf to the calls of social justice.

In America the democratic spirit gives to every man the hope of rising. To this we owe our illimitable energy and our inexhaustible strength. It is the great imponderable of the subject, and while there is much in democratic institutions today which, judged by the ponderables, would cause our faith to waver and our minds to be clouded with despair; yet, judged by this great imponderable, we know that the march of man, wherever democracy has led him, is steadily forward. He may, at times, sink into a "slough of despond" or a morass of difficulty, but that eternal hope, which the spirit of democracy has planted in his breast, gives him the strength to struggle out of the morass and march resolutely forward to the "Delectable Mountains." Such was the spirit of Washington, Jefferson, Franklin and Lincoln, and it is this invincible faith, triumphing over fear, that has made them the great leaders of the American people. As long as democracy can produce such leaders, it vindicates itself.

I fear I have detained you far too long, but I cannot refrain, before concluding, from recognizing the fact that democracy has hitherto had its most effective and noblest expression in the Constitution of the United States. It is true that that great charter is not in method wholly democratic. On the contrary, it marked a salutary reaction against the extreme claims of democracy. Its essential spirit was finely expressed by Edmund Burke, when he said:

> Liberty, to be enjoyed, must be limited by law, for law ends where tyranny begins, and the tyranny is the same, be it the tyranny of a monarch, or of a multitude —nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny.

While the Constitution does set limits to the power of the majority and, to this extent, negatives the extreme claims of democracy, yet, as it was adopted by the American people and has now been maintained by them for over one hundred and forty years, it is broad-based upon the more permanent general will and is, therefore, in the final sense of the word, democratic.

It is significant that, in all the violent changes of this changing world, our form of government has been most stable. It has been in the past, and will increasingly be in the future, the model for democratic governments, and upon its maintenance and perpetuity the future of democratic institutions may depend.

Let me recall the proud prophecy of John Bright, one of the noblest democrats of our time:

> I see from the East unto the West, from the rising of the sun to the going down thereof, in spite of what misled, prejudiced, unjust and wicked men may do, the cause of freedom still moving onward; and it is not in human power to arrest its progress.

AMERICAN BAR ASSOCIATION

Committee on
Supplements to Canons of Professional Ethics

ANNOUNCEMENT

The Executive Committee of the AMERICAN BAR ASSOCIATION, at its recent meeting in Denver, authorized the following announcement:

Pursuant to the recommendation of the Committee on Supplements to Canons of Professional Ethics, in its annual report to the American Bar Association, the Executive Committee has authorized this publication of an offer to all members of the American Bar Association who so desire, to subscribe to "Annotated Canons of Legal Ethics" (a pamphlet of 280 pages) prepared by the Chairman for use of the Committee. The subscription price is $1.00. The book will be bound in uniform style with annual reports of the Association.

Subscriptions accompanied by a remittance of $1.00, will be received at the office of the Secretary of the Association, William P. MacCracken, Jr., 919 The Rookery, 209 So. La Salle Street, Chicago, Illinois, until December 31, 1926.

When the number of subscriptions is thus ascertained, an adequate edition will be printed and the type distributed.

Subscribers may expect to receive their copies at the addresses given by them shortly after January 1, 1927.

CHARLES A. BOSTON, Chairman,
24 Broad Street,
New York City.

A Correction

To the Editor:

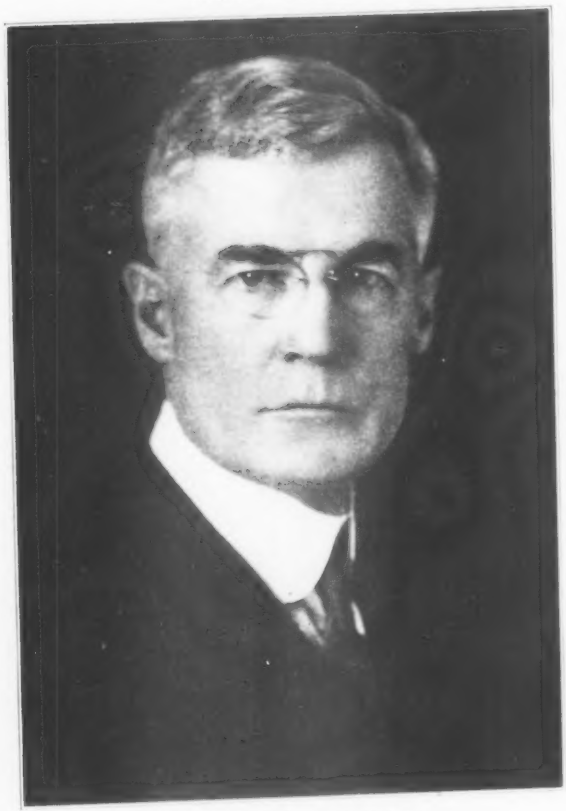
In my review of Mr. Reed's pamphlet on Recent Progress in Legal Education, I was in error in stating that Montana should be included in the states requiring two years of college work as preparatory to the study of law. The two year college requirement in Montana may be satisfied at any time before admission to the bar. Mr. Reed was, therefore, correct in not including it with the four states that he mentioned. While the Council of Legal Education has not always found it possible to fully agree with Mr. Reed's views, it has always found him entirely accurate in his statements of fact relating to Legal Education and Admissions to the Bar.

JOHN B. SANBORN,
Secretary, Council of Legal Education and
Admissions to the Bar

Speakers at the Annual Meeting at Denver

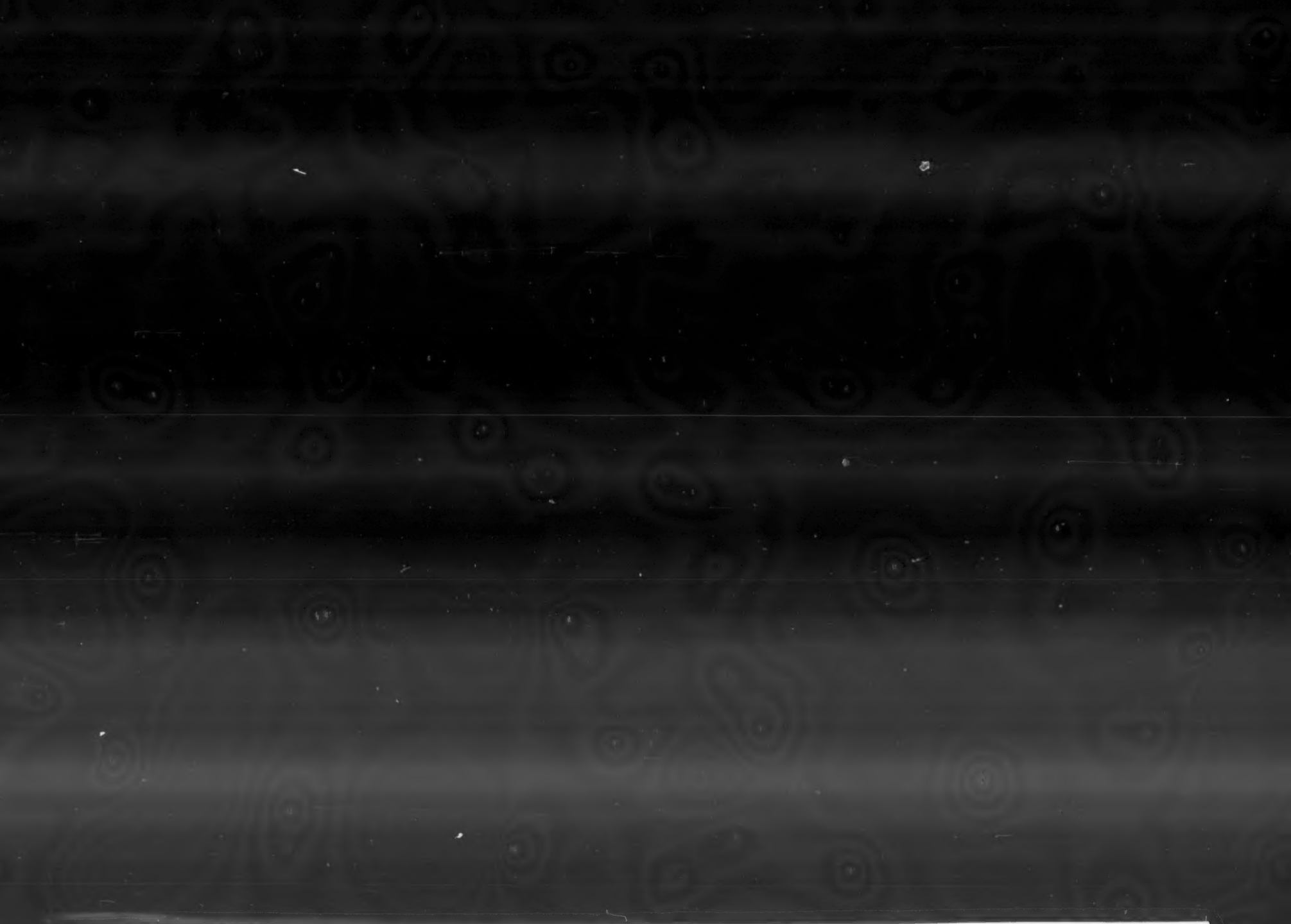
HON. WILLIAM E. DEVER
Mayor of Chicago

ROSCOE POUND
Dean of Law School, Harvard University



THOMAS J. NORTON
Of the Chicago, Ill., Bar

HENRY A. DUBBS
President Colorado Historical Society



THE CANONS OF PROCEDURAL REFORM

Regulation of Procedure by Rules of Court and the Judicial Council Are at Foundation of All Effective Procedural Reform—Importance of Putting Procedure in Its Proper Relation to the Substantive Law—Factors to Be Considered in Any Program of Reform Today—The Four Canons*

By Roscoe Pound
Dean of Law School, Harvard University

I ASSUME that sooner or later we shall give up the exotic idea of a code of civil procedure, or a practice act in its image; I assume that in a time not far distant we shall revert to the common-law system of regulating procedure by rules of court instead of committing its details to legislation after the Romanized model unhappily adopted in New York in 1847. So I assume that the practice act of the future will at most deal only with the general features of procedure and prescribe the general lines to be followed. It will be an enabling act, empowering courts to do things, not a restricting act, imposing a mass of detailed limitations upon every action of the tribunal. It will leave details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates. I assume also that in the framing of these rules, the courts will be advised and aided by a judicial council. These two things, regulation of procedure by rules of court and the judicial council, are at the foundation of all effective procedural reform. Assuming them, on what basis shall we construct a series of canons with reference to which the details of reform of procedure may be carried out?

Let us begin with a comparison that may throw light upon our problem. Let us compare the common-law canons of descent with the canons we are about to construct. The canons of descent have been abrogated by nineteenth-century legislation. But they illustrate certain ideas and methods that we shall need to avoid. Also they illustrate how common-law lawyers frame canons by legal reasoning applied to authentic legal materials.

Three factors govern in the common-law canons of descent, namely: a principle of succession according to proximity of cognatic relationship, which had been formulated and carried out in detail in Justinian's hundred and eighteenth novel; a principle of entirety and continuity of feudal services, which was assumed by English land law in every connection; and the exigencies of formal logic in an era of scholastic philosophy. How great a part the latter played may be shown by such rules as those barring the father and mother in certain cases because the inheritance must descend and so could not go up. It is illustrated by such things as the objection urged by Osgoode, first Chief Justice of Canada, to Blackstone's solution of a controverted problem of inheritance. Blackstone's solution, he said, marred the symmetry of the scheme of descent. Hence, it was to be rejected, logical symmetry of the legal scheme being one of the purposes for which rules of law existed. I need not tell you that no one would frame canons in that spirit today. Today we feel that logic should be an instrument, not an end. We use logic as a means of achieving certain purposes of the law. But we have our eyes on those purposes. We expect legal machinery to attain those purposes. We use logic as a means of attaining them. We do not conceive of logical symmetry as any substitute for those purposes, nor should we suffer those purposes to be defeated by merely verbal arguments on the basis of the words by which legal institutions happen to have been described.

Two fundamental differences separate the legal thought of the time when the canons of descent were devised from the legal thought of today. Today we look at the phenomena of law from a functional standpoint. We ask how far the law and each legal institution and doctrine and precept achieve the purpose for which they exist. We ask what we may do to make each more effective for its purpose. Also, today, we begin with history. We do not expect to make something of nothing by a sheer act of creative reason. We recognize that we must work with historically given materials, and that our task is chiefly one of selection from among those materials and of reshaping them and adapting them to new purposes.

Not only do these two fundamental differences set us off from the common-law canons of descent and the principles of common law procedure, which might easily be put in the form of a brief series of canons of the same sort; quite as much they distinguish the lawyer of today from those who drew our codes and practice acts in the middle of the last century. At that time, no one thought of a functional critique. It was supposed that if legal precepts were abstractly just, they would commend themselves to the individual conscience and thus would maintain themselves with a minimum of sanction. Also those who framed the codes and practice acts which furnished the model for American jurisdictions, regarded history as irrelevant. The law reformers of 1850 were impatient of history. They cared little what the law was or how it came to be what it was. They believed that they could set off wholly the question what the law ought to be from the question what it was and the question how it had come to be what it was. In practice, it is true, they were guided at every step by the law of the past as they had learned it. But this was a blind, subconscious guidance. When on unfamiliar ground, they conceived legal tradition as embodied reason. When on familiar ground,

*Address delivered July 15 at 49th Annual Meeting of the American Bar Association, at Denver, Colo., July 14-16.

they thought that *a priori* ideas were self-sufficient, and they were wont to ignore the previous lessons of judicial experience. In consequence, they created a just suspicion of projects for reform of procedure which endures to this day.

What were the historical materials behind what we may fairly call the canons of procedure at common law, and how do they compare with the materials with reference whereto we must construct the canons of procedure for tomorrow? Two factors seem to me to have been decisive of the principles of common-law procedure: (1) The procedure of Germanic law with its trial term and issue term and consequent quest for a single formal issue to be determined by a mechanical mode of trial; and (2) scholastic philosophy and formal logic operating on ideas of a single formal issue and mechanical trial. Thus, there is a historical element and a logical element. But the historical element has become formal and the logical method is that of formal logic. For instance, it was enough to have a formal issue as in the general issue in *indebitatus assumpsit*, or the general denial in actions of ejectment or replevin under the codes of procedure. Also the single issue must be formally single at all costs, as witness Coke's discussion of Crogate's Case and the replication *de injuria*—but it was enough if it was formally single as in the general issue in *indebitatus assumpsit*.

What are the factors in any program of procedural reform today? I venture to think they will prove to be three: The materials of the simplified common-law, equity and code procedure of nineteenth-century America; comparative law through the influence and example of the English practice under the Judicature Act and the rules of court thereunder; and the functional attitude of modern science of law, leading us to recognize the purely subsidiary place of procedure in legal systems in the maturity of law.

Nothing is more important in any program of procedural reform than to put procedure in its proper relation to the substantive law. As one reads discussions of procedural reform in the current reports of bar associations, he cannot but be struck with the widespread assumption that the exaggerated role of procedure in American administration of justice is something inevitable and universal; that administration of justice by courts is and must of necessity be primarily and chiefly administration of an elaborate body of procedural precepts; that if we do away with the huge growth of procedural detail that encumbers our judicial administration in so many states today, the only result will be to substitute a new set of details, which will in their turn raise endless new questions of interpretation and application and will make our condition worse than it is. We have to learn at the very outset that there is no reason why procedure should bulk so large in a modern system of law as it does in the law of American jurisdictions today.

History can tell us why it is that so much of our law is procedural and why we so persistently think in terms of procedure. The logical sequence is right, duty, remedy, action. If one were building a new legal system with the legal achievements of the past at his disposal, he would set up and define legal rights (using the term in its widest sense), would impose duties as a means of making those rights effective, would devise remedies whereby the duties might be enforced, and would provide actions or legal proceedings in which the remedies might be invoked. But the historical order is the reverse. First come actions—formal judicial proceedings to invoke the intervention of politically organized society in a private dispute. Next come remedies. Men work out definite forms of relief which may be obtained of the magistrate when invoked by the appropriate action. In time, when the system of remedies has come to operate harshly because of neglect of the moral aspects of things in the strict law, men take over from morals the idea of duty and put a system of legal duties behind the system of legal remedies. Finally, in the maturity of modern law, men conceive of individual rightful claims behind and given effect by this system of duties, and work out and establish an elaborate system of individual legal rights.

Let us remember that the system of individual rights, worked out in minute detail, with which we are so familiar today, is something thoroughly modern. Even the maturity of Roman law had no such conception as a legal right in the modern sense. In the old writ of right of our feudal land law, the demandant sought what was right in view of the case he brought forward. He did not assert his legal right as a plaintiff would do in modern litigation. The fundamental notion of an individual legal right—fundamental for the law of today—comes into legal systems in the growing period of modern law, with the philosophical idea of natural rights, of which it is a legal version. It culminates in the restatement of the whole law in terms of legal rights, which was the great achievement of the science of law in the nineteenth century.

Today our real check upon the judiciary, our real security against judicial willfulness and magisterial caprice, is in the detail of the substantive law and the detailed system of individual legal rights which the substantive law recognizes or establishes and seeks to maintain and enforce. It is in the necessity imposed upon courts of deciding in accord with the substantive law and so of giving effect to legal rights. But for historical reasons we impose upon tribunals a two-fold burden. We require them to reach their decisions by a scrupulous adherence to elaborate rules of procedure. Also we require that the decisions themselves conform to the substantive law and give effect to substantive legal rights. Under this double burden, it happens not infrequently that in their zeal to give effect to procedural requirements, tribunals fall short of giving effect to the substantive law and to substantive legal rights. Captain Mahan's story of the English captain in the days of the formal naval tactics of the eighteenth century, who so zealously followed the admiral's orders to keep a certain number of cable lengths astern of the ship next ahead in the order of battle that in the smoke and excitement of battle he went through the French line without firing a shot—this story may be paralleled from everyday experience of how substantive purposes are defeated by procedural requirements in American administration of justice.

We did not impose a burden of procedural requirements upon our courts simply for procedure's sake. Elaborate, formal, detailed procedure once served a substantial purpose. It antedates the systematic development of substantive law. It goes

back to a time before the thorough working out of a system of individual legal rights. Before the time of a body of substantive law, before the evolution of the system of legal rights, the only check on the tribunal, the only security for liberty, was in strict rules of procedure rigidly administered.

There were actions. There were remedies. Indeed, the strict law, whether Roman or English, was a system of remedies. But the substantive logical implications of those remedies were yet to be discovered. The great book of the strict law in our legal history is the register of original writs. The law was an aggregate of precepts governing the application of the legal remedies provided by those writs. The proposition that judges were to decide according to the law of the land meant that they were to adhere to the procedural rules governing the issuance and application of these writs. How one obtained a writ and for what remedies, appropriate to what situations of fact, how he proceeded after he got the writ, and how the judgment should flow out of the writ and the record founded thereon—the legal precepts furnishing the answers to these questions made up the body of the law. When men had given up private self-help and subjected themselves to the force of politically organized society as the paramount agency of social control, the general security demanded a system of checks upon magistrates and judges, and this was found at first in the law of procedure. Substantive law evolved gradually and indirectly through the evolution of procedure. Today we no longer need an elaborate system of procedure to serve as a check upon the courts. We have a better check in the full and detailed system of substantive law that was so well organized by the judges and jurists of the nineteenth century. Procedure as a means of securing individual liberty has done its work. Today procedural law is needed for subsidiary purposes only. In the present stage of legal development, we may bring about certainty and uniformity in judicial decision much more effectively by means of substantive rules, the system of legal rights and the training of judges in a reasoned system of principles.

Thus we come to what I should put as the first canon of procedural reform:

I. *Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice.*

If we examine the body of precepts that make up the common law of procedure, we shall find three sorts of rules, looked at with respect to their purpose. First, there are precepts designed to secure litigants against arbitrary granting or denying of legal remedies by making the judicial allowance of those remedies depend rigidly and absolutely upon compliance or noncompliance with fixed procedural forms and exact logically developed procedural formulas. This type of precept antedates the modern development of substantive law. It puts claims to procedural advantage where the law of today puts claims to substantive advantage. So far as rules of this type fulfill no other purpose, they have done their work. They are an anachronism in the law of today. Procedural reform in England has laid them aside. Procedural reform in Continental Europe in the first decade of the present century had substantially done away with the last remnants of this type of procedural precept in the civil law. Secondly, there are procedural precepts designed to provide for the orderly despatch of judicial business, the saving of public time, and the maintenance of the dignity of tribunals. Thirdly, there are procedural precepts designed to secure to all parties to litigation a full and fair opportunity to present their case and their claims arising out of it to the tribunal, and a full and fair opportunity to meet the case brought against them and the several claims arising out of that case.

Obviously the second and third type of procedural precepts are as needful now as they ever were. But before the evolution of a system of substantive law, before working out in detail of a system of individual legal rights, no distinction was made with respect to the three types. All seemed to stand upon the same basis. When the claims of the individual litigant were looked at in terms of procedure, his claims to have the rules of the game observed seemed to be the same with respect to every precept in the books. Hence, when the law became conscious of individual substantive rights, and set up a system of legal rights as the fundamental thing underlying judicial administration of justice, there seemed to be individual rights with respect to procedure, individual claims to procedural advantages, on the same plane with and to be given the same force and effect as substantive legal rights. This not unnatural mode of thought of the earlier years of the maturity of law, joined with the Anglo-Saxon bent for contentious procedure and love of a fair fight, and the desire of the pioneer American to see a forensic game of skill in backwoods court houses, gave us what Dean Wigmore has termed so aptly the sporting theory of justice. That theory has quite disappeared in England, where it was vigorous enough less than a century ago. It is wholly out of place in the urban, industrial America of today, and, indeed, it passed its meridian in the United States twenty-five years ago at least.

But it is only by differentiating the second and third type of procedural precepts from the first type, and divesting the second and third types of the substantive features attributed to them when the third type remained undifferentiated, that we may eliminate wholly the unhappy features of legal procedure that have been described as corollaries of the sporting theory of justice. Out of this differentiation we may derive our second canon. The proposition on which it proceeds is that individual rights are substantive; that procedural rules exist in the interest of the public, and except as means of giving effect to individual substantive rights, are not to be invoked by litigants but are to be invoked and made effective at the instance of the courts. To litigants they must be instruments only. They are not to be things to which individual litigants have claims in and of themselves. Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors such as were asserted and enforced in our courts in the last quarter of the nineteenth century. The spectacle of rules of evidence, made to prevent waste of public time, used as a means of obtaining new trials, to the utter waste of judicial time; of rules meant to assure the orderly course of judicial

business used as rules of a game to enable litigants to thwart or delay the orderly presentation of the meritorious claims of their adversaries—such abuses as these had much to do in bringing about widespread popular dissatisfaction with the administration of justice at the beginning of the present century. Their relation to the way in which our substantive law developed out of procedure is clear enough. That they have no place in the maturity of law where substantive law and procedure are differentiated is no less clear. Hence, we may put as our second canon of procedural reform

II. *There should be no such thing as an individual procedural right—i. e., a recognized absolute claim to a procedural advantage merely as such.*

It follows that it should be for the court, in its discretion, not for the parties, to vindicate rules of procedure intended solely to provide for the orderly despatch of business, the saving of public time, and the maintenance of the dignity of tribunals; and that exercise of judicial discretion in such cases should be reviewable only for prejudicial abuse. Common-law lawyers have an instinctive distrust of judicial discretion. Yet English lawyers have learned to practice under the widest and fullest judicial discretion with respect to procedure. Nor is it difficult to see why. When the different types of procedural precepts are undifferentiated and claims to procedural advantages are put on the same plane with substantive legal rights, if any procedural rules are committed to judicial discretion, it is made to appear that substantive individual legal rights are put at the mercy of the discretion of the judge. If this were so, it would be intolerable. But when a simpler procedure differentiates procedural precepts and brings out their true purposes, lawyers see readily enough that the substantive rights of their clients are advanced by leaving procedural rules of the second type to the discretion of the judges, and that nothing substantive is sacrificed where the whole energies of the tribunal are exclusively devoted to ascertaining and giving effect to the substantive rights of the litigants.

It follows also that rules of procedure which exist for purposes other than for saving of public time and maintenance of the dignity of tribunals should be regarded as means of securing to all litigants full and fair opportunity of presenting their case and of meeting the case against them; hence nothing should depend on or be obtainable through such procedural rules except the securing of that opportunity. It should not be possible for a litigant to defeat his opponent or to throw him out of court and compel him to begin anew because of procedural rules. In case of variance, the only application should be for time or opportunity to meet the claim of which the litigant avers he was not fairly apprised. It is worth noting that when the matter is put on this footing, claims of variance are seldom made, as one may verify readily by comparing the current English reports with our own.

Next we must divest our legal procedure of the modes of thought that have come down to us from the mechanical forms of trial of the beginnings of our law. When issues were tried by battle or ordeal or compurgation, when the jury found a verdict on the general knowledge of the neighborhood, upon a simple question put them by the justices, it was necessary to formulate a single, simple issue admitting of definite determination in this mechanical fashion. But for centuries these mechanical modes of trial have been superseded by a rational trial by a jury that hears evidence or by a court that hears evidence. Yet so difficult is it for a legal system to escape from the lines of development laid out in the stage of the strict law that all our thinking about procedure is dominated by ideas that have their origin in and are only appropriate to mechanical modes of trial. The great lawyers of our classical period developed these ideas logically and gave us a stock of procedural principles wholly out of touch with the purposes of modern law and unrelated to modern forms of trial. Not the least achievement of recent English procedure has been to get rid of them.

Specifically, the unhappy features of our procedure that come down from the exigencies of mechanical modes of trial are record worship, issue pleading, the throwing of cases out of court instead of transferring them to the place where they belong, and piece-meal disposition of controversies. Much progress has been made on all these points in the past twenty-five years, but much remains to be done. Most of all, moreover, we need to recognize why these things are anachronisms in modern law and to frame new and simpler principles of procedure accordingly.

This is not the place to argue details. I must content myself with asserting that a record is not something to be tried, as it was in the days of mechanical modes of trial. Today the sole function of the record must be simply to preserve a memorial of what has been done in a cause. Procedural rules should be such as to enable the court at every stage to try the case, not the record. The sole concern should be to see to it that what has been done is so far recorded as to preserve the substantive rights of the parties, and to see to it that at the end of the litigation the judgment rendered and the causes of action and defenses adjudicated are recorded.

Also I must content myself with asserting that the office of pleadings should be to give notice to the respective parties of the claims, defenses and cross demands asserted by their adversaries. Hence, whenever that office may be performed sufficiently without pleadings, pleadings should not be required. Moreover, when pleadings are required, the pleader should not be held to do more than fairly to apprise his adversary of what his claim, defense or cross demand is to be. Issue pleading has long been a delusion because it presupposed a form of trial obsolete for centuries. It is common knowledge that the issues on the record are not necessarily the issues at the trial. Indeed, the charge of the court now has to formulate the issues in most cases after the evidence is in, the pleadings having raised any number of sham issues which came to naught at the hearing. Nor do pleadings separate issues of law from those of fact, except in form and appearance. Neither do they lay any sure foundation for pleas of *res judicata*, as the continual proof of what was in issue by extrinsic evidence abundantly witnesses. What issue pleading does achieve is endless opportunities for procedural points, as such, without any gain to substantive rights. In this respect, the lesson of modern English pleading is impressive.

When law was a system of remedies, not a system of substantive rules defining and securing sub-

stantive rights, the function of a tribunal was simple. It existed only to try whether or not the plaintiff was entitled, at the hands of that tribunal, to the specific remedy that he formally sought. The spirit of that time has been with us ever since, though the law is now much more than a system of remedies, and courts exist to do justice by giving effect to legal rights, not merely to apply mechanical tests to claims of definite remedies. It is a gross anachronism to dismiss, reject or throw out a cause, proceeding or appeal wholly because it is brought in or taken to the wrong court or wrong venue. If there is one accessible where it may be brought or prosecuted, it should be transferred thereto, and all prior proceedings should be saved.

Most of all, however, the equitable principle of complete disposition of the entire controversy between the parties should be carried out to its full content and should be extended to every sort of proceeding. Piecemeal disposition of controversies is another result of logical development of ideas appropriate to mechanical modes of trial and to law as simply a system of remedies. In modern society, the courts should be able and it should be their duty in every kind of cause or proceeding to grant whatever relief and to allow whatever defense or cross-demand the facts shown and the substantive law may require. Likewise, courts should be able in all proceedings to render such judgment against such parties before them as the case made requires in point of substantive law; to bring in such parties as are necessary to complete disposition of the entire controversy, even though all are not interested in the entire controversy; and so far as possible to dispose of all questions of fact finally upon one trial.

Generalizing the foregoing proposition, we may put as our next canon:

III. *The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy should be replaced by an ideal of complete disposition of entire controversies in one proceeding in which all the remedies of the legal system are available in order to give full effect to the substantive rights of the parties.*

Finally, we should divest procedure of the modes of thought and resulting practices that grew up in the United States when we had for a time to use litigation as a means of finding and shaping the law. As a series of new commonwealths were set up in the successive waves of our westward expansion across the continent, each with its own local law grounded upon the common law of England, but required to be applicable to the peculiar geographical, social and economic conditions of the particular locality, it was necessary to reshape the traditional legal materials somewhat rapidly, and the only agency at hand for so doing was private litigation. Thus it was important that the lawsuit between John Doe and Richard Roe should do more than adjudicate the controversy between them. Chiefly, it had to be used as a means of settling the law. Hence we constructed our judicial hierarchy in each state more with a view to thoroughgoing consideration of questions of law and the laying down of a body of well-considered precedents than with a view to speedy and complete disposition of controversies. As a result there has been an exaggerated development of appellate procedure. Also in most states we have retained too much of the spirit of the common-law review by writ of error which entailed a mechanical trial by inspection of the record. An appellate proceeding ought to be as simple as a motion for a rehearing or new trial, or a motion for vacation or modification of the order or judgment complained of. Such it is in effect; only it is made in a higher tribunal. There is no reason why it should be more formal or require more in the way of procedural steps than such a motion made in the court of first instance. That we treat it otherwise is due partly to our taking the procedure in error in the House of Lords as our model rather than the rule for a new trial in King's Bench or Common Pleas after a trial at circuit. But chiefly it is due to an endeavor to make appellate proceedings bear the brunt of developing the law and a consequent feeling that what happened to the litigants in any concrete cause was something of minor importance. The work of making a common law for America, and of formulating a local version thereof, so far as necessary for each state, has been done well. Now, we may turn our attention to the claims of the litigants.

We may then state as our next and last canon:

IV. *The ideal of appellate procedure should be not a separate proceeding in a distinct tribunal but an application for rehearing, new trial, vacation or modification, as the case may require, made in the same cause before another branch of the same tribunal.*

In the foregoing canons I have sought to express no more than what has actually been achieved in more than one English-speaking land. The English came to these ideas of procedure first because they were first to undergo the transition from a rural, agricultural to an urban, industrial society. We are now in that same transition. They had peculiar difficulties because of an accumulated mass of obsolete institutions, ancient abuses, medieval practices and formalities dating from the over-refinement of the eighteenth century and its insistence on the etiquette of justice. We have peculiar difficulties because of the influence of pioneer conditions in determining our legal institutions in their formative era. Our problems are so far our own that we may not expect to borrow British solutions whole nor to copy British rules of practice in so many words. But the ability to utilize comparative law is an inestimable advantage. We can see where the British erred between 1828 and 1890 and where they succeeded and why. We can see more clearly the general principles by which we should be governed.

Criminal Appeal in Scotland

"A question which has for many years proved an attractive subject for discussion among lawyers and social reformers in Scotland—the expediency of providing an appeal in the more serious class of criminal case—has now been settled, or has at least been deprived of practical importance. For by the passing into law of the Criminal Appeal Act, 1926, provision for such appeal, whether expedient or not, is now an accomplished fact. On the side of the general proposition that some such provision was desirable, and that the time was ripe for providing it, there would probably be found a preponderating weight, certainly of lay, and probably also of professional opinion."—*Scottish Law Review (July)*.

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IMPROVED METHODS OF JUDICIAL PROCEDURE

The Forty-ninth Annual Meeting of the American Bar Association was characterized, more than any prior meeting, by unmistakable evidence that the profession is deeply concerned in the improvement of the methods of procedure to be employed in the courts, and that there is now nearly unanimous accord that the criticism of the press and of the laity is to be taken seriously, that there is little hope of speedy improvement except by the exercise of the ancient and inherent power of the courts which has been usurped by the legislative department, and that in the resumption of this power the courts should be aided by Judicial Councils.

While the program certainly did not lack variety, it would doubtless be correct to say that "procedural reform" was the keynote of the Denver meeting. President Long dwelt particularly upon it in his annual address, a symposium devoted to the subject was one of the principal features of the sessions, and Dean Pound spoke on it before the Conference of Bar Association Delegates. Various other incidents of the meeting left no doubt of the profession's recognition of its outstanding importance.

The last few years have been particularly fruitful in discussion of the problems of the courts, and in the direction of organization distinct advances have here and there been made. Procedural reform has lagged, in spite of the fact that it is absolutely essential to a proper administration of justice, and the further fact that the discussion here has been unusually thorough and conclusive. It is believed, however, that the work done in way of preparation has not been lost, and that the time is perhaps ripe for the gradual but sure adoption of necessary changes. President Long expressed the view that the public was at last coming back to the courts, after having tried a great variety of commissions and quasi-judicial tribunals without success, and this tendency would seem to imply a growing willingness to give the courts a fair chance by freeing them from the shackles which have so long impeded their efficiency. There are certainly indications that the press is beginning to take the profession's proposals for improvements in procedure more seriously than ever before, and this is a circumstance full of encouragement.

In the forefront of these proposals is, of course, the regulation of procedure by rules of court, instead of by rules imposed by the legislature. This, with the judicial council, Dean Pound declared at Denver, lies "at the bottom of all effective procedural reform." To the discussion of this subject during the past few years the addresses of Dean Pound and of Mr. Sunderland at the Denver Meeting made a distinct and valuable contribution. In fact, it is difficult to imagine what remains to be said from the standpoint of history, logic or experience after their exposition of the subject. Certainly there has not heretofore been any real effort to meet the arguments already adduced in favor of this improvement, and the addresses at Denver would make such an effort even more doubtful than before.

As one reads these addresses, the inconsistency of prevailing methods of dealing with the courts becomes so plain that even the simplest layman can understand it. For some reason we seem to have set the courts apart as agencies not to be affected by the fruitful ideas and movements which are vindicating themselves in other fields. In the political field, for instance, we are more and more demanding that responsibility be located—that we know who is to blame for a failure to discharge the public business. State governments are being reorganized to that end. In the case of the courts we are maintaining for the most part a system which renders it impossible to locate responsibility. It may be the legislature which imposes the rules of procedure or it may be the way in which the courts administer them which is at fault. The logical thing of course is to give the courts the power and thus fix the responsibility. Until that is done, both courts and legislatures will be able to evade the blame.

In the business world we are demanding efficiency and in the administration of jus-

tice we are adopting methods which render it impossible. Imagine a business concern trying to operate with its rules and regulations fixed by another concern not in the same line of business and one with a bit of traditional jealousy into the bargain! In the business world we recognize without question the importance of the expert where expert work is to be done. In the courts, where expertness is above all essential, we commit the dictation of how the business shall be conducted to men who are not experts, or who, even though they have some knowledge of the subject, are too engaged with more interesting matters to give the problem due consideration. In the business world we pride ourselves, above all, on being practical and having due consideration for the lessons of experience. In the courts we have heretofore deliberately shut our eyes to the actual successful working of a different system elsewhere.

Even more inconsistent than all this, we are denying the ordinary courts the powers they need to function efficiently and dealing out the same powers with lavish hands to courts and commissions of a later creation. As Mr. Sunderland said at Denver, "Every new court which Congress has created since the advent of the Field Code has been given express power and authority to make and amend its own rules for the regulation of practice and procedure. This was true of the old Court of Claims, established in 1855, and its authority to control its own procedure was continued when it was given full judicial powers in 1863. The United States Court for China was established with full rule-making power in 1906. The Court of Customs Appeals was organized with similar authority in 1909. The Commerce Court, during its short career, exercised the same power. Finally in 1920, Congress enacted a new code for the District of Columbia, and therein conferred upon the Supreme Court of the District authority to 'establish written rules regulating pleading, practice and procedure, and by said rules make such modifications in the forms of pleading and methods of practice and procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive and expeditious the remedy in all suits and proceedings,' provided that its equity rules shall not be inconsistent with the equity rules issued by the Supreme Court of the United States." What is more, the Interstate Commerce Commission, the Board of General Appraisers, the Board of Tax Appeals, the Federal Trade Commission and the Federal Power Commission, all operate under full rule-making authority.

This is not all. We are always talking of taking the courts out of politics and at the same time are consigning to a strictly political body the regulation of how they shall carry on their business. We are insisting on the constitutional principle of the separation of powers of the executive, legislative and judicial departments and at the same time the legislative department is exercising what amounts to the right to say whether or not a coordinate department shall administer justice properly.

Finally, we are insisting that the sole object of the courts is to achieve certain ends and we are permitting the legislatures to elevate the means to be employed to an authority equal to the ends to be attained. We are thus dimming the vision of the main objective and leading to a confusion of means with ends. From this exaltation of procedure at the expense of the substantive law itself the profession is far from exempt, and Dean Pound finds the explanation in the sort of legal education that prevailed in the United States generally until the present generation and still persists in many parts of the country. "In the beginning," he points out, "all common-law lawyers were apprentice-trained. The lawyer learned the art of his craft as any craftsman learns his trade, by watching his elders and seeing how they did things, and doing the like. . . . This apprentice-training is before all a training in the details of local procedure." Hence the tendency of those so trained to think in terms of procedure rather than of substantive law and to regard it, in fact, as the main department of law.

But while the inconsistencies of present methods are obvious, the logic of the proposed reform complete, and the lessons of experience point wholly in one direction, much remains to be done before this needed change is secured. Legislation presents a good deal more than a problem in logic. It presents a problem of organization, of pressure, of publicity, of attracting the attention of the public as well as of the legislator.

There are states where the legislatures can thus be persuaded to restore the rule-making power to the courts, but where they prove obdurate, the remedy is for the courts themselves to resume the inherent powers of which the legislature had no authority to deprive them.

THE EXERCISE OF THE RULE-MAKING POWER

Division of Responsibility Between Legislatures and Courts in Matters of Procedure—Anglo-Saxon Conception of a Court as Confirmed and Sustained in England—American Repudiation of Doctrine of Professional Control—Unfortunate Results—Rule-Making Powers Given to New Courts and Quasi-Judicial Tribunals—Machinery to Encourage and Facilitate Exercise of Power*

By Edson R. Sunderland
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"POPULAR government rests upon the principle that it is every citizen's business to see that the community is well governed."[1] But this principle can operate only if responsibility for governmental action can be definitely located. The citizen must know who is to blame for the failures of which he complains, or his watchfulness will be of no avail. Eternal vigilance is a condition but not a guaranty of liberty.

The short ballot theory is nothing but an application of the doctrine of fixing responsibility where the people can see it. The public business must be concentrated where it will operate openly in the light of perpetual publicity. Division of authority always obscures responsibility, and where the officers or agencies which share the power are so related that the efficiency of one is dependent upon that of another, the public becomes utterly confused in its attempt to locate the source of trouble and provide a remedy.

Now the mal-administration of justice in the United States has aroused an extensive and sustained interest on the part of the public and the profession, but no practical results of importance have followed. The public bitterly complains, the profession extends its sympathy and concedes that something ought to be done, but the courts go steadily on in exactly the same old way. Who is responsible?

That is a question which, in most of our jurisdictions, cannot be answered, and because it cannot be answered no relief is in sight. We have divided the responsibility between the legislature and the courts, and have thereby destroyed the possibility of locating the blame. The legislature makes the rules which the courts administer. Is the fault in the rules themselves or in the way in which they are employed? No one knows. The courts and the profession believe they are doing fairly well with the rules that they are forced to use, and point to the legislature as the authorized source of procedural reform. The legislature does not know what is wrong with the rules, and believes that the chief difficulty is the inefficiency of the profession.

Faced with the dilemma of shifting and unascertainable responsibility, the public is helpless, and the administration of justice continues to be the one conspicuous political failure in American popular government.

But there is another aspect of the situation no less important. If political policy demands that responsibility be conspicuously localized, economic necessity requires that it be placed in competent hands.

No modern observer would be inclined to dispute President Lowell's assertion that the ability of popular government to endure will depend upon its capacity to use experts.[2] The administration of justice has always been a difficult and delicate function of the state, and as civilization develops the complexity of the problem increases. No one can possibly understand or appreciate the nature of the technique essential to the work of the courts who is not familiar with the conditions under which litigation proceeds. And if judicial procedure is to be kept in close adjustment with the constantly changing requirements of society, the regulation and development of that procedure must be under the supervision of those who carry on the work of the courts.

It is not enough, therefore, merely to locate responsibility for the proper administration of justice. It must be located in the hands of that trained body of experts, who, as lawyers and judges, constitute the judicial establishment of the State.

II

If David Dudley Field had been a more thorough student of the history of the common law, he would not have been so readily fascinated by the novel principle of legislative control of judicial procedure. It was a principle which seemed to offer unlimited possibilities of relief from burdens long endured. But those who hoped to bring the millenium through the magic of legislation, failed to appreciate the delicate adjustment of machinery necessary to an efficient administration of justice.

Never, in the eight hundred years since the Plantagenets laid the foundations of our system of judicial administration, did Parliament ever undertake to chain the courts to the chariot wheel of a legislative code of procedure. A few corrective statutes found their way into the law. Magna Charta prohibited the courts from selling justice, gave the common pleas a fixed location, and established the principle of trial by jury. A dozen statutes relating to amendments are found among the records of four centuries of parliamentary activity.[3] Here and there new remedial rights were created and old procedural abuses were cut off. But there is no instance, in all English history, of parliament undertaking to assume to itself the political responsibility for the administration of justice, nor to offer its crude, fragmentary and stereotyped

*Address delivered on July 15, at 49th Annual Meeting of American Bar Association, at Denver, Colo., July 14-16.

1. 2 Bryce: Modern Democracies, 489.

2. Public Opinion and Popular Government.

3. Collected in Appendix to Stephen on Pleading (Andrews' Ed.), pp. 473-4.

notions of procedure as a substitute for the expert opinions of lawyers. Not even during the storm and stress of the nineteenth century, when the flood of popular resentment threatened to engulf the profession, did Parliament lose its poise. The first great reform wave brought the Civil Procedure Act, of 1833,[4] in which a considerable number of procedural anomalies and restrictions were removed, but at the same time the preamble of the act recited that, since improvement in the methods of administering justice could not be conveniently accomplished otherwise than by the Rules and Orders of the judges, therefore the judges should make such alterations in the rules of pleading and practice as they should deem expedient. Out of this legislation grew the famous rules of Hilary Term, 1834. They did not satisfy the public. But instead of violently seizing the power of regulating legal procedure, Parliament again undertook to assist rather than oust the courts. The Common Law Procedure Act of 1852[5] was a fairly complete procedural code, in 239 sections, but it contained the remarkable provision that the judges were nevertheless to retain complete power to make any rules regarding pleading and practice that they might deem expedient, anything in the present act to the contrary notwithstanding.

For 800 years the Anglo-Saxon conception of a court had been that of a dynamic agency clothed with the power to supply the people with every necessary means for enjoying the protection of the laws of the land. England chose to confirm and sustain that power, and in every one of the procedure acts which were passed in the course of her long struggle for reform, she expressly recognized and reserved the authority in the judges to make general rules and orders, even to the extent of changing the form of proceedings established by Parliament.[6] In the Judicature Act of 1873 the theory of professional responsibility found its final recognition in a statute which frankly abandoned even the form of a legislative mandate and substituted a schedule of Rules of Court.

America, on the other hand, chose to repudiate the doctrine of professional control. No more striking contrast in political theory could be conceived than is afforded by the procedure acts of the last century in England and the almost contemporary legislation in the United States beginning with the Field Code in 1848. The New York legislature believed that the courts could be entirely regulated by the clumsy and alien hand of the popular assembly, and yet suffer no loss either in technical skill or in capacity to respond to the public demand for service. It was a political and economic blunder of the first magnitude, and set a precedent which changed the American judicial establishment from a living stream into a stagnant pool. Deprived of all initiative in devising new means and methods, and safely concealed under the political shadow of the legislature, our courts have become lifeless and bureaucratic, substituting regularity for efficiency as an operating ideal.

III

Seventy-five years have passed since England and the United States stood at the parting of the ways and made their momentous decisions. Those years have been full of progress in England; they have been years of quiescence here.

Practically all the improvements in civil procedure which have made England the envy of the world were invented or adopted during that period by professional experts charged with the high responsibility of enabling Englishmen to enjoy prompt and adequate justice. The summons for directions was invented to enable the court to exercise an effective control over the progress of the case from its earliest stage; the originating summons was devised as a means for getting judicial decisions on specific questions without drawing the entire subject-matter into litigation; discovery before trial has been tremendously expanded; summary and declaratory judgments have been made more available; the technical problems of joinder of parties and of causes of action, and of the use of counterclaims, have practically disappeared, and in their place has come the simple question of convenience; model forms of pleading have been adopted to take the place of detailed rules; chamber practice in equity has been revolutionized by the so-called "linked-judge" system whereby each case is assigned to a pair of judges, one of whom is always in court while the other is in chambers; a commercial court has been organized and operated to serve the needs of the large commercial interests; venue in every case is fixed by the court on the ground of convenience; the powers of the court of appeal have been enlarged and the procedure so simplified that no appeals fail for procedural errors and practically no new trials are ordered; a body of permanent masters, serving in effect as assistant judges, has been organized to take over an important part of the work of the courts. Not a year has gone by in which some improvement in the rules has not been introduced. They are under constant inspection, and whenever weaknesses are discovered or changes in business or social conditions make old methods of legal procedure inappropriate, new rules or amendments are provided to meet the need. The court-rule system is a vital organ of the state, functioning steadily, quietly and effectively through its inherent creative power. By its means the legal profession enjoys high credit for its skillful performance of an important public service.

Seventy-five years under a legislative system of procedure has accustomed the legal profession in America to a dogged perseverance in a hopeless cause. The conduct of the intricate specialty for which they were trained was taken out of their hands, and the political representatives of the people prescribed the rules of practice upon which the success or failure of the administration of justice largely depended. Doubtless the public felt that reform was necessary, but recourse to the direct action of the legislature is at best a harsh method of public self-help, where the people demand by force what they fear the law, in its orderly development, will not furnish. It is extrinsic, detached and arbitrary, suggestive of revolution, rather than a gradual expansion of implicit possibilities through the creative power of the courts. So careful a scholar as Sir Frederick Pollock has declared that relief by direct legislation "is not a natural opera-

4. 3 & 4 William IV, c. 42.
5. 15 & 16 Vict., c. 76.
6. For instance, the Common Law Procedure Acts of 1854 (17 & 18 Vict., c. 125) and 1860 (23 & 24 Vict., c. 126).

tion at all, but a catastrophic interference."[7] And in another connection he refers to the specific amendment of procedural rules by legislation as "a serviceable instrument when rightly handled, but in unskillful hands it can be a remedy worse than the disease."[8]

Rules of procedure laid down by legislative mandate do not grow spontaneously out of the exact requirements of actual practice, and they fail to show that delicate adaptability to circumstances which distinguishes a professional technique. In other words, they are not practical. They embody legislative theory, not judicial experience, and often tend to destroy by their clumsy abstractness the very purposes which they are created to serve. The subtle appreciation of the conditions of litigation, which can come only to those who spend their lives in the active administration of justice, is not possible among the members of a popular assembly who meet to make the laws. Even though bills dealing with legal procedure may be drawn up by lawyer members, the political atmosphere of a legislative body is not friendly to the close and painstaking study of an intricate mechanism.

Normally, legislatures are timid about making important procedural changes, because they lack technical information. They are usually inclined, therefore, either to leave the subject alone or to busy themselves with meddlesome changes in minor details. Such bills can readily pass when bills of real importance would provoke extended debate and successful opposition. This was the history of the New York Code of Civil Procedure, which became so bulky and complicated as to be almost unworkable. It was a conspicuous instance of legislative tinkering with small points of practice. As Sir Frederick Pollock has observed, "Even a tinker of genius cannot get beyond tinkering, and tinkers are not men of genius as a rule."[9] On the other hand, the failure of many legislatures to make any attempt to keep legal procedure adjusted to changing needs, has thrown the practice in those states into a distressing condition of obsolescence.

Courts have often lamented the lack of elasticity in legislative rules of practice, and have been forced against their wills to execute the crude, ineffective or harsh commands which legislatures have thoughtlessly passed and quickly forgotten. "If," said the United States Supreme Court in dealing with the service of process upon a city, "the common law (which is common sense in matters of justice) were permitted to prevail, there would be no difficulty. . . . But when a statute intervenes, and displaces the common law,' we are brought to question of words, and are bound to take the words of the statute as law."[10]

Such a system of procedure, in which the words of the legislature have supplanted the spirit of jurisprudence, could not fail to be narrow, formal, and lifeless. And during the three-quarters of a century that the legal profession in America have been excluded from the responsible control of the procedure which they alone used and understood, not a single important new feature of American origin has been added to our methods of dealing with litigation. The Field Code contained one reform of extraordinary consequence, namely, the abolition of forms of action and of the distinctions between actions at law and suits in equity. But the Field Code was the product of a legal revolution, and revolutions do not function regularly, and cannot be relied upon to meet the constant demands of a changing civilization.

Instead of placing the code in the hands of the courts as a mechanism to be used, improved, and developed by the profession, as Parliament had always done with its procedural statutes, the American legislature placed the seal of finality upon its legislation and thereby destroyed its power of growth. Under such conditions it is not surprising that we have been imitative rather than original, and our most notable improvements in practice have been borrowed from England.

IV.

It might be supposed that the persistent use of legislation throughout the United States in the regulation of the procedure of our ordinary courts, indicates that our legislative bodies, at least, have not been impressed with the theoretical weaknesses, political, economic and historical, which can be so powerfully urged against it.

A survey of contemporary political development, however, will demonstrate exactly the contrary. Every new court which Congress has created since the advent of the Field Code has been given express power and authority to make and amend its own rules for the regulation of practice and procedure. This was true of the old Court of Claims, established in 1855, and its authority to control its own procedure was continued when it was given full judicial powers in 1863.[11] The United States Court for China was established with full rule-making power in 1906.[12] The Court of Customs Appeals was organized with similar authority in 1909.[13] The Commerce Court, during its short career, exercised the same power.[14] Finally, in 1920, Congress enacted a new code for the District of Columbia, and therein conferred upon the Supreme Court of the District authority to "establish written rules regulating pleading, practice and procedure, and by said rules make such modifications in the forms of pleading and methods of practice and procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive and expeditious the remedy in all suits and proceedings," provided that its equity rules shall not be inconsistent with the equity rules issued by the Supreme Court of the United States.[15]

But the problems of legal procedure are not confined to those tribunals which exercise powers which we term strictly judicial. Modern political ingenuity has developed a vast group of quasi-judicial bodies exercising powers which, for constitutional reasons, are termed administrative, but which deal with exactly the same kind of controversies and are confronted with exactly the same procedural problems as those tribunals which we call courts.

For forty years the Interstate Commerce Commission has possessed and exercised the power to

7. "The Science of Case Law," in Essays in Jurisprudence and Ethics, p. 242.
8. The Genius of the Common Law, p. 72.
9. Pollock: The Genius of the Common Law, 72.
10. Amy v. City of Watertown, 130 N. S. 301.
11. 36 Stat. L. 1139.
12. 34 Stat. L. 816. Sec. 5.
13. Act of Aug. 3, 1909, Sec. 28.
14. 36 Stat. L. C. 231, Sec. 206.
15. Act of April 19, 1920.

make general rules and orders regulating its own procedure.[16] The Board of General Appraisers,[17] the Board of Tax Appeals,[18] the Federal Trade Commission,[19] and the Federal Power Commission,[20] all operate under full rule-making authority.

The states have followed exactly the same course as the federal government. Every railroad or public utility commission in the United States has been given general authority to adopt rules of practice and procedure governing hearings, investigations and proceedings before it.[21] And the workmen's compensation laws, which in effect transferred to boards or commissions the jurisdiction over industrial accidents formerly exercised by the courts, have invariably given to those commissions the power to make rules for the regulation of their own practice and procedure. When the courts, rather than commissions, are given power to administer relief under the compensation laws, as in Kansas[22] and Minnesota,[23] those courts are themselves clothed with power to make rules of procedure.

It thus appears that the almost universal American practice, in establishing new tribunals, whether judicial or quasi-judicial, has been to place the full responsibility for effective procedure upon those in charge of their operation. This has not been due to the conviction that the procedure of the new courts and commissions is more difficult than that of the ordinary courts. On the contrary, the limited jurisdiction of most of them makes their technique more simple, and yet the legislatures have uniformly declined to undertake to do for them what they have so long done for the regular courts. The reason seems not hard to find. Wishing to make the new tribunals function strongly, the legislatures which created them were unwilling to tie their hands by a rigid set of rules. They wanted results. They were unfamiliar with the conditions under which these new courts and administrative bodies would operate, and understood well enough that efficient methods are the joint product of technical training and practical experience. Both qualifications could be found only among those who were to be actively engaged in the administration of the new tribunals. There were no ancient traditions to dull the judgment and banish common sense. Therefore the development and operation of the new judicial agencies were placed in the hands of experts.

V.

Every reason for giving special courts and quasi-judicial tribunals the rule-making power applies with still greater force to the ordinary courts. Their tasks are more varied and intricate, they affect the lives and fortunes of the people much more intimately, and their failure to function properly is a more conspcuous and damaging example of governmental inefficiency. If injured workmen, public utility companies, importers, federal taxpayers, shippers, and other special classes, can enjoy the benefit of tribunals operated by experts, why should the ordinary citizen be refused an equal privilege?

Our courts of general jurisdiction have been allowed to remain outside the current of reform for no other apparent reason than the lack of an easily available method of overcoming their inertia. A new court or a new commission will be certain to use its rule-making power, for it cannot function at all until rules of procedure are framed. But an established court is under no such practical necessity, and it can drift along indefinitely upon its old practice without taking up the burden of reform.

It is not enough, therefore, to confer upon our courts the general power to regulate procedure by rules and orders, but there must be machinery devised for encouraging and facilitating the exercise of the power.

England immediately discovered the need for such a device after the Judicature Act came into operation. The rule-making power had been placed in the hands of a sort of general council of the bench, [24] but the responsibility was so far diffused that vigorous action was impossible. Accordingly a definite Rule Committee of six judges was constituted which was later increased to eight.[25] But the exclusive employment of judges in the regulation of the practice was soon found unwise, and in 1894 three active practitioners were added.[26] This was again changed in 1909, when the present plan was adopted whereby the practicing profession is represented on the Rule Committee by two barristers and two solicitors.[27]

This arrangement constituted no departure from the court rule principle, for that principle is based upon the doctrine of expert, professional control of procedural processes. It by no means requires that the power should be exercised by the official judicial body technically defined as a court, but rather by those who, whether as judges or lawyers, are actually engaged in carrying on the work of litigation.

While judges constitute a majority of the members of the English Rule Committee, so that in its personnel it represents the court, it has nevertheless a distinct and independent existence which relieves it from two weaknesses inherent in a strictly judicial body.

A court is primarily engaged in performing judicial duties, and these constitute a first charge upon its time and attention. Incidental administrative tasks laid upon it will always take a subordinate place, and may even be entirely neglected. If, therefore, the duty of actually making rules is committed to the court in its official capacity, the press of strictly judicial business will leave small opportunity for getting the rule-making done.

Furthermore, the judicial character of our courts has caused them to be withdrawn in large measure from the field of political criticism. In a government based on law, the decisions of the courts must command public respect and obedience, which requires that the opinions of the judges should not be influenced by popular pressure. But the manner in which the business of the courts is transacted is, on the other hand, a subject which is eminently suitable for public discussion, criti-

16. Act of 1887, Sec. 17.
17. 36 Stat. at L. C. 6, Sec. 12.
18. Revenue Act of June 2, 1924, Sec. 900.
19. Act of Sept. 26, 1914, Sec. 5.
20. Act of June 10, 1920, Sec. 4.
21. Report for 1923 of Committee on Uniformity of the National Association of Railway and Utilities Commissions, p. 243.
22. Sec. 35.
23. Sec. 22.
24. Jud. Act, 1875, Sec. 17.
25. Jud. Act, 1881, Sec. 19.
26. Jud. Act, 1894, Sec. 4.
27. Rule Committee Act, 1909.

cism, and suggestion. It is a political question of great popular interest, and no people should be expected to tamely endure a denial of justice due to an inadequate legal practice. If that practice is established by the courts, they ought to be held politically responsible for it, and to be subject to attack when their performance falls below the standards set by public expectation. But it will be hard to distinguish between the court as a judicial body whose decisions must enjoy immunity from political criticism, and the same court as the source of a procedure in which the public has a direct and active political interest; and the pressure of public opinion, which ought to be constantly exerted in the interest of a better system of administration, will be likely to fail under a fear of invading the judicial sanctuary.

Both of these difficulties have been successfully surmounted in England by the Rule Committee, which actually represents the High Court, but does its work and stands before the people as a legally independent body. The Rule Committee has no duties to perform except the regulation of legal procedure, so that this task receives its undivided attention. It is not a court, it performs no judicial functions, and therefore operates in the stimulating atmosphere of free political discussion.

The same problem has confronted us in organizing a system of professional control for our legal procedure. Lawyers and judges are both officers of the court, and both must participate in any successful formulation of rules for the administration of justice. But we lack machinery for effecting such cooperation. Probably there would be constitutional obstacles to the delegation of rule-making power to such a body as the English Rule Committee, and our efforts to secure a court rule system have invariably assumed that the ultimate power must be lodged in the court itself. But such a grant of power is not self-executing, and if it is to be adequately exercised an administrative mechanism must be provided which will enable us to avoid the two chief causes of inertia already discussed, namely, the press of judicial duties, and the immunity of the courts from public criticism.

Various plans have been proposed. In New Jersey the Bar Association secured legislation creating a "Council for Judicial Procedure," consisting of four judges, the attorney general, and three practicing lawyers, to supervise the rules of practice and report at regular intervals what changes were deemed advisable.[28]

In Colorado, the Bar Association created a Committee on Judicial Procedure, with power to recommend to the Supreme Court such improvements in the rules as it deemed necessary, and to advise and assist the Supreme Court at its request. But there has been no cooperation between the court and the committee, and it has recently requested the Supreme Court to itself appoint a standing Rules Committee, consisting of two district court judges, one county court judge, and four practicing lawyers, with power to consider and recommend improvements in the rules.[29] I am told that during this past year such a Rules Committee has actually been appointed, and is already functioning vigorously.

In Michigan the State Bar Association has long acted unofficially as an intermittent rule committee, and its recommendations have been gladly received and usually approved by the Supreme Court.

The success of any plan will depend on the degree with which the court recognizes its need of assistance in performing the difficult duty of making and improving the rules of practice. The success of the English system was due to the Rule Committee. Our courts can have advisory rule committees, either established by the legislature, or provided by the bar associations, or created by the courts themselves. Such committees could carry the burden of the investigation and preparation of changes in the rules, which the courts cannot carry. They could assume political responsibility for receiving the complaints and suggestions of the public and of at least presenting to the court adequate measures for relief. If such committees should be constituted with an able and distinguished personnel, if the tenure of membership should be long enough to stimulate close study of the problems, and if their recommendations should be cordially received under the prima facie presumption that they were suitable for adoption, they might prove as useful as the Rule Committee in England.

There has perhaps been too little cooperation between the bench and bar. The entire legal profession is under the fire of public criticism, and the two branches are held jointly liable for the failure of the courts to do prompt and effective justice. Both have a vital interest in rendering a better account of their stewardship to a long-suffering public. By recognizing their common cause and offering their resources for the professional control of legal procedure in the interest of a better public service, the bench and bar may be able to reestablish the legal profession in the confidence of the people.

28. Year Book, N. J. Bar Ass'n. 1914-15, p. 169.
29. 28 Colo. Bar Assn. Rep. (1925) 211. 27 Id. (1924) 340.

Speakers at the Annual Meeting at Denver

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PROBLEM OF LAW ENFORCEMENT IN THE LARGE CITIES OF THE UNITED STATES

Law Enforcement in Any Community Must Depend, Theoretically, on Attitude of General Public and on Effective Judicial Machinery—Changes Needed Under Latter Head—Situation Created by Eighteenth Amendment and Volstead Act—Need of Honestly Recognizing and Appraising Existing Conditions—Unprejudiced, Scientific Investigation of Facts Suggested*

By Hon. William E. Dever
Mayor of Chicago

THEORETICALLY, law enforcement in any community, large or small, must depend upon two factors: First, a conviction on the part of substantially all members of the community that the laws set up for their government and well-being are just and reasonable and an insistence that violations of such laws be adequately punished. Second, the institution and maintenance of sufficient judicial machinery and a system of judicial procedure effective to secure prompt and certain conviction of the guilty.

For many years the American Bar Association and kindred organizations, officially and through the voice of their memberships, have urged upon the legislative departments of the Nation the critical need in many of our states of a re-examination of the whole subject of criminal procedure and practice. The changes have been rung upon this plea so often that it has become rather an old story. As an indication of how difficult it is to move the legislative mind, at least in certain states, toward the completion of this necessary reform, attention may be called to the fact that the Chicago Bar Association has appealed, not once, but many times, to the State Legislature to reconstruct and amend our criminal procedure and practice so as to render it possible for the courts to bring persons charged with criminal offenses to speedy trial, and, further, to eliminate the unconscionable delays that occur during criminal trials.

Many things, at least in Illinois, have operated against the Chicago Bar Association in realizing this purpose, one of which is that the lawyer members of the Legislature, in the main, take but little interest in or actually oppose the elimination of an archaic system of criminal law procedure that is rendering it practically impossible for our criminal courts to function in such a manner as to strike terror to the hearts of evildoers either actual or potential. The conditions in Illinois may be said to be typical of those which exist in certain other jurisdictions.

To quote from Dean Mikell of Pennsylvania University Law School:

> Due to historic reasons that cannot be gone into here, the provisions for safeguarding the innocent accused person have grown out of proportion to the accusatory provisions, and so the system has been thrown out of balance with the result that too many guilty escape conviction.

The problem, then, as concerns the second of the factors to which I have referred is to bring sufficient pressure to bear upon legislative bodies so that, by the enactment of adequate laws, it will become possible to deal out swift and certain punishment to those who, in increasing numbers, find it possible to live without labor by violating every law that exists for the promotion of public peace and order.

In the first place, prompt trials are impossible with an insufficient number of criminal court judges. In Cook County, with which I am particularly familiar, we have not had at any time within the last twenty years a sufficient number of criminal court judges to promptly dispose of the constantly increasing number of criminal cases. An effort is made to make as prompt a disposition as possible of the so-called "jail" cases (cases where the defendants are unable to give bail), but bail cases, even of homicide, are often not tried for a year or two years after indictment. The facility with which bail is furnished in cases of the most serious character makes the situation one of extreme seriousness. Cases are by no means uncommon in Cook County of second and third offenses, committed by persons out on bail for a supposed first offense. Even under an inadequate and antiquated system of procedure a sufficient number of judges in the criminal courts to try any case within thirty or sixty days after the return of an indictment would go a long ways toward improving present conditions.

The strict rules of ancient pleading as to indictments should be modified and amendments in matters of form permitted under such limitations as would not deprive the defendant of any substantial right.

Our cumbersome and tedious method of jury examination in criminal trials (such examinations not infrequently lasting from two weeks to two months) should be entirely changed. Preliminary examination of jurors by the judge, or assistants to the judge, to determine the presence or absence of a cause for challenge, and the "striking" from a panel so passed for cause of an equal number after a reasonable examination by the attorneys for the prosecution and defense in lieu of the present right to exercise from three to twenty peremptory challenges would go far toward eliminating the entirely unnecessary delay accompanying such examinations under existing practice.

Instead of the oft repeated spectacle in so-called "insanity defenses" of highly paid medical experts taking up days and weeks of time in swear-

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ing to diametrically opposed opinions, provisions should be made for the substitution of official unbiased commissions, paid by the state, to determine the strictly medical question of sanity or insanity whether at the time of the commission of the crime or before the execution of sentence.

The law in many states prohibiting the trial judge in charging the jury from commenting on the facts deprives the jury of a disinterested analysis of the evidence by the trained mind of the only unbiased participant in the trial,—the judge.

Our practice on appeals should be greatly simplified. The English system might well serve as a model. Let criminal appeals take precedence over all other appeals. Let them be heard within thirty, or at the most, sixty days, on the typewritten record of the lower court's proceedings and an oral argument except in cases of extraordinary importance where the court of appeals requests a written brief and argument.

Parole laws can and should be as nearly automatic as possible, thus avoiding the possibility of abuses too well known to need specific statement. In some states every conviction, except for murder, carries with it a minimum and a maximum sentence. A first offender with a perfect prison record automatically becomes eligible for parole at the expiration of his minimum sentence, a second offender at the end of a term of years fixed to expire between the minimum and maximum sentence, and a third offender must serve the maximum sentence. Demerits for breaches of prison discipline are computed and added to the time at which the prisoner would otherwise be eligible for parole. Only in most extreme cases can the fixed period and computation be varied.

The above are some of the more important procedural reforms in the administration of criminal justice which if made effective would in my opinion go far toward making the courts an efficient instrument to carry into effect the will of the community, assuming that that will is to insist that all violations of law be promptly and adequately punished.

As I have already indicated, it is that will of the community, or, in other words, the attitude of the general public toward the enforcement of law, with which I more particularly want to deal in this paper. Possibly because of the controversial nature of the question involved there has been a woeful dearth of outspoken, impartial utterance. Because of its bearing upon the fundamental question of preserving law and order in many of our communities, the time is ripe for a statement of the facts, scientifically and accurately ascertained, rather than prejudiced or interested individual or group opinion. The first step in that approach is to honestly recognize and appraise existing conditions.

The prevalent belief that there is a growing disrespect for law is, in a measure, but not entirely, well founded. Many, probably most, of the laws that exist for the protection of life and property are as respected today as they ever were. The trouble arises from the fact that certain laws have been enacted in recent years not at all aimed at eliminating things of moral turpitude, but rather for the purpose of regulating human conduct in certain matters regarding which there is in many parts of the country a dominant belief that the law-making authorities have no right to interfere. To obtain in all quarters respect for the innate quality of such laws is an impossible task.

In the year 1920 Congress passed the Volstead Act, which was intended to give vitality to the Eighteenth Amendment to the Federal Constitution which prohibited the sale and traffic in intoxicating liquor. The effect of the Eighteenth Amendment and the Volstead Act was to create new social inhibitions in several of the important industrial States. The consequences in those States of attempts to enforce this Federal legislation, while startling to many, are but the natural results of the conditions in those States.

For our present purposes we may disregard many matters of deep interest touching the actual benefits conferred by or the evils which have followed the passage of the Federal prohibition laws as asserted by those who either support or oppose them. The purpose of the law is to eliminate drunkenness, but in attempting to do this the use as well as the abuse of intoxicating liquor is prohibited. Not by moral but by legal methods it is sought to control the habits and conduct of all of the people of the United States. Act and conduct deemed innocent by many good citizens have suddenly by force of law become criminal. Is it to be wondered that so abrupt an interference with their private conduct is regarded by such persons as an intrusion upon their purely personal rights? I am not urging this by way of argument but merely to indicate that persons so affected cannot be thus brought to respect or obey such laws and that general disrespect for law and the deep-seated cynicism respecting the motive and good faith of law-enforcement officials is a natural reaction of persons so affected.

The first attempt to eliminate drunkeness was by precept and example. These moral methods were in a large way successful; so successful, indeed, that the citizens of one-half of the states of the Union voluntarily imposed such laws upon themselves. The beneficent results of these methods were so pronounced that it was mistakenly thought that prohibition could be imposed as a national policy upon other States where the people had not become ready or willing to adopt such a policy.

Canada tried the experiment of national prohibition, but certain of its large provinces have materially modified that program—so also in Sweden substantially the same experience was had. These changes were due to the fact that absolute prohibition as a national policy failed to meet with popular approval.

In these countries the population is relatively homogeneous and not difficult to control and one would be persuaded to believe that these nations would present a favorable field for prohibition experiments, but the policy when enforced even there was so attended by unrest and other evils that it was deemed advisable to modify it.

Is it then to be wondered that in the United States, because of its territorial extent, the widely divergent character of the occupations and industries of the various States, the heterogeneity and inherited traditions of the large so called foreign elements of the northern and northeastern industrial States, the presence of a local racial question

in the southern States, and the peculiar self interests of certain other States, that the attempt to enforce this law as a general policy applicable alike to the people of every State in the Union should have been fraught with much difficulty and attended with most disturbing consequences?

These very consequences were foreseen by thoughtful students of the question. Mr. James Coolidge Carter, a profound student of the law and a leader in his day of the American Bar, in notes written by him in 1906 for his Harvard University lectures, said concerning a proposal to pass prohibition laws:

> The object the lawmaker seeks to gain by this legislation is to do away with, or greatly diminish, the indulgence in intoxicating drinks, for, although the sale only is prohibited, the real thing sought and expected is the prevention of the use. He wholly fails to gain the object in view; but objects not in view, and by no means desired, are brought about on the largest scale; vast and useless expenditures, perjury, and subornation of prejury, violation of jurors' oaths, corrupt bribery of public officers, the local elections turned into a scramble for the possession of the officers controlling the public machinery for the punishment of offenses in order that that machinery may be bought and sold for a price; law and its administration brought into public contempt, and many men otherwise esteemed as good citizens made insensible to the turpitude of perjury, bribery and corruption; animosity created between different bodies of citizens, rendering them incapable of acting together for confessedly good objects.

How complete has this amazing prophecy been realized. Mr. Edward M. Abbott, Counsel for the Director of Public Safety of Philadelphia, in the May, 1926, issue of the Annals of the American Academy of Political and Social Science, said:

> The enforcement of the Volstead Act has opened many channels for the illegal use of money. Disregard of the Eighteenth Amendment, which is a part of our Constitution and as much a part of the Constitution as the Bill of Rights, has led to the commission of many other crimes besides that of bribery. A most amazing condition has resulted to the body politic through the honest attempt in Philadelphia to enforce the prohibition laws. Perjury struts naked through our halls of justice, and disregard for the sanctity of the oath prevails in most of these cases. Public officials, police officials, magistrates, grand jurors, petit jurors, and even some judges upon the Bench forget that they are all sworn to uphold the Constitution and laws, both of the Nation and the Commonwealth, before they enter upon the activities of their offices. Witnesses in court no more regard the oath as binding them to tell the truth, but use their testimony to their own advantage, irrespective of its truth or falsity. If jurors do not like the law they acquit defendants who are charged with transgressing it. If jurists find the law obnoxious to them they discharge malefactors, convicted of breaking it. If police officials have been tainted with avarice and have fallen for a price, then memory becomes hazy and faulty, and so we have farce after farce enacted in what should be courts of justice.

I have stated quite publicly that even an unpopular law can be enforced if all law enforcement agencies will set to work in a wholehearted way and by co-ordination of their efforts to enforce such a law. Common experience, however, tells us that up to date this has not been done so far as National Prohibition laws are concerned. But even if all law enforcement officials in our large cities, in a spirit of high public service, were to co-ordinate their efforts in a genuine purpose to enforce the laws, the question of the wisdom of our Federal Prohibition laws as a national policy would still remain unsolved for the reason that so many of the people upon whom the laws operate do not respect, and will not willingly obey them.

During the first year or two after the passage of the Volstead Act, the effect was generally beneficial. Following this period, however, came the organizations of bootleggers, beer runners, and official corruptionists; within the last two or three years, a new and extremely disturbing development has followed the organization of this syndicated commercialized traffic, that is, the widespread making of beer and hard liquor in private homes. It is charged, I do not know how truly, that there are five thousand private stills operating in the City of Chicago. I have no doubt, however, that the making of intoxicating liquor in the private home is spreading very rapidly in Chicago and perhaps in all of the large cities in America. This presents a problem of extreme difficulty and grave danger. The effect upon family life is, of course, disintegrating. The only legal way to deal with this phase of violation of the Volstead Act is by use of the search warrant. I doubt the practicability and seriously question the desirability of this method. The English common law has been more or less changed in response to our changing social needs, but the principle that every man's house is his castle and inviolate by unreasonable search and seizure has been written into the United States Constitution and into the constitution of every State. The most unpopular, the most oppressive, the most dangerous writ, because of its liability to abuse, known to the law is the search warrant that permits an officer to enter the private home of a citizen. And that is the remedy that we must use now if we are going to stop these stills and the home-brewing and making of moonshine by private families. It is that writ, provided only for extraordinary exigencies from the abuse of which the people have been guarded by constitutional provision since the Magna Charta, of which we must make wholesale use to meet this latest phase of prohibition law violation.

Elective officials depend for their office upon votes. Men who hold or aspire to public office are but human and they will react humanly to their environment. In communities where prohibition laws are unpopular, the voters will not support either the laws or those who would enforce them. The resultant of all this is that these laws are not always obeyed by public officials. They are neither respected nor obeyed by the people. And in addition to all this is the fact, most unfortunate, that men are elected to public office dependent solely upon their views on the prohibition question and without much regard to their probity or capacity.

Prosecuting officials, judges of the courts, executive officers, all respond to what they believe to be the public will, and it is not quite human to expect them to oppose that will, particularly in connection with a subject that does not involve any degree of moral turpitude.

And this fact, so obvious and easy to state, when seriously contemplated, is a matter of deep concern to the nation.

Is it then unreasonable to appeal to the trained mind of the American lawyer to ponder well the condition of our large American cities? Could one properly be called an alarmist were he to state that the presence in one form or another of the illegal traffic in liquor in Chicago and other great cities has been followed by a train of circumstances that very seriously threaten the possibility of good government in such cities?

This much may be asserted with confidence:

The intent of the law has not been realized. Neither the use nor the abuse of intoxicating liquor has been eliminated by our prohibition laws and it is not positively known today by anybody whether there is more or less drunkenness in the nation at this time than there was before the adoption of the Eighteenth Amendment.

No recognized authority, public or private, has yet attempted, without preconceived ideas and opinions as to the value of the law, a survey of the entire problem with a view to determine the present actual facts and conditions. And how many are the unknown factors that should be determined before the entry of final judgment on the issues made up by the welter of claims and counterclaims of the contestants? To what extent has the human loss and misery caused by drunkenness been reduced? And what as a matter of fact has been the effect of the laws in promoting peace, happiness and prosperity in American homes?

Is it in fact true that the youth of the nation is being insidiously weakened in its morale since the passage of the laws by the secret use of liquor?

To what degree is official inefficiency and corruption due to this national policy? And if it be true that there is in the nation a growing disrespect for law and an alarming increase in criminality, then how much, if any, of this is due to the attempt to impose laws that are not respected by so many otherwise law-abiding people?

If it be admitted that national prohibition has been followed by great good as well as alarming evil, then who in the present chaotic state of public knowledge and public opinion is authorized to say which is the greater, the good or the evil?

My official position because of my daily experience with this problem quite possibly has given me a prejudiced view of the matter, but out of that experience I have come to the belief that the liquor question is one of first importance to the nation, for it ramifies into almost every part of our social and political structure.

Prohibitionists urge that all good people should support the new governmental policy and that prohibition in a general way is successful and beneficial to the Nation. Anti-prohibitionists assert that the doctrine of the Eighteenth Amendment and the Volstead law are fundamentally erroneous, that the Eighteenth Amendment for various reasons infringes upon purely personal and inalienable rights with which free government, under any form, has no right to interfere.

The heated and frequently extravagant positions taken by both sides to this controversy have driven the whole subject back into American politics so that there is not now in many of the northern states much opportunity in political life to discuss any other question.

One wonders whether the wets and drys do not assume a little too much when neither side will concede that underlying this whole difficulty there may be a question of deeper significance to the people of this Nation. Prohibitionists assume that the liquor question is settled; anti-prohibitionists very vigorously deny this. One stubborn fact stands out. Six years have passed since the passage of the Volstead Act, and today the governmental policy prescribed by that law is the most discussed question before our people.

The liquor question is not settled. No question can be regarded as finally disposed of where the law which assumes such settlement meets with so serious opposition and objection from a very large part, perhaps a majority of the people.

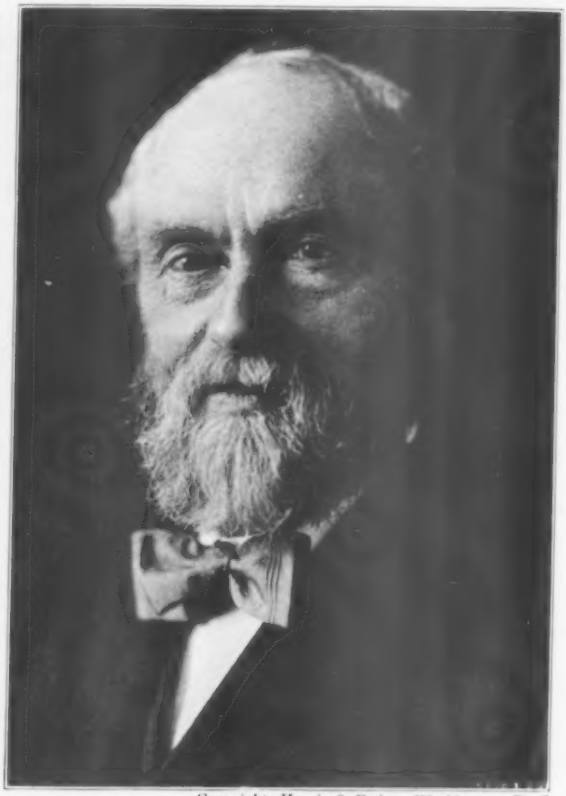
During the investigation recently concluded by a sub-committee of the committee on the judiciary of the United States Senate, the wets and the drys were given a field day, and while much illuminating evidence was submitted to the sub-committee, a mere casual reading of its report would show that the extravagance of statement on either side was so marked as to render it impossible for that sub-committee on the evidence submitted to conclude anything of real value therefrom.

A reading of the evidence submitted before the sub-committee will not fail to convince one that neither side of this national controversy can see but little wisdom in the position taken by the other side, and herein lies the great difficulty. In the vehemence and even the extravagance of the position taken by proponents on either side of the question the moderate-minded intelligent citizen who is deeply concerned about the welfare of his country is almost driven to cover. Yet, I do not think it entirely impossible that the majority of the people of this country, many of whom would not care to be enlisted as drys or wets, are so anxious for domestic peace that they would be quite willing to support any well considered and far visioned move looking toward a permanent solution of the matter. Abraham Lincoln is credited with saying that next to human slavery the intemperate use of intoxicating liquors constituted the most serious menace to the National morale. Movements toward temperance and total abstinence have done as much perhaps as any other agencies to bring happiness and peace and the finer things of civilization to the homes of the people. Prohibitionists in the main are wholeheartedly striving for the promotion of human happiness and the good they have accomplished in this country is quite immeasurable. One cannot withhold a sincere admiration for their main purpose nor a fervent wish that they may in the course of time succeed in completely eliminating the intemperate use of intoxicating liquor from human experience.

If it be conceded that large benefits have followed the enactment of these laws and also that great evils have followed in their train, then the work of the statesman is to determine whether the good coming from the laws may by constructive legislation be retained and the evils resulting therefrom eliminated. That, I take it, is one of the really large problems now confronting the people of this country.

Is it at all possible that the question may receive new treatment at the hands of persons whose emotions and prejudices may not be too deeply engaged in the subject one way or the other? For the fervor and vehemence of both the proponents and opponents of prohibition render many of them unfit to view the question objectively and practically. Indeed, many of them give the impression that they are actually trying not to see facts that are plainly obvious to the man who has no special feeling in the matter except the promotion of the public good—the record of the recent investigation

HON. FRANCIS RAWLE
Charter Member honored at Denver Meeting



HON. SIMEON E. BALDWIN
Charter Member honored at Denver Meeting

by the sub-committee of the Senate which I have already referred to is an exposition of this. That record is replete with truth as well as error and neither side at the hearing had a monopoly of either. It was inherent in the constitution of this committee that the hearing would result in merely a debate. The members of the committee evidently were anxious to obtain facts, but they were supplied with such a mixture of fact, theory, argument and even misrepresentation, that so far as is known not a single member of the subcommittee has indicated a modification of his preconceived opinion.

One thing may be concluded, however, from this investigation, and that is that this question is still unsettled in the public mind; that there is a wide diversity of public opinion as to the effects of these laws and that there exists a national problem of immense consequence to the country. The question now arises, keeping in mind solely the general welfare of the Nation, whether this whole intricate question should not be re-examined by some competent authority with the view to bringing about a final adjustment, if that be possible, which will retain, or even extend, the undeniable benefits of prohibition and at the same time retain and restore a general regard for and obedience to law.

I would suggest an unprejudiced, scientific investigation of the facts. That investigation should be at the direction of the Congress of the United States and should be conducted by a commission the personnel and connections of which should be a sufficient guaranty of the accuracy and honesty of its conclusions. Such a commission might consist, for instance, of representatives of the Chamber of Commerce of the United States, the American Federation of Labor, the American Bar Association, the American Medical Association, and perhaps other national organizations of like disinterested character. It should be given sufficient means and ample power to make a thorough survey of the entire question and should be authorized to report its findings of fact and conclusions as to how best to deal with the conditions found to exist.

I believe such an approach to the problem would appeal to the innate spirit of law observance and sense of fair play of the American people. The conclusions of such a commission, based upon the facts, would satisfy many elements at present uninformed and dissatisfied. The adoption of its recommendations would, in my opinion, go far toward re-establishing that general public demand for law observance without which the most highly organized and efficient judicial machinery must function inadequately and uncertainly.

Contributions

The contributions and letters in the JOURNAL are signed with the names or initials of their writers, and the Board of Editors assumes no responsibility for the opinions contained therein beyond expressing the view, by the fact of publication, that the subjects they treat of are worthy of the attention of the profession.

SECTION ON MINERAL LAW ORGANIZED

ORGANIZATION of a new section of the Association, that on Mineral Law, will date from the memorable Denver meeting. Certainly no more suitable environment for the launching of a project of this particular kind could have been found than the practical center of an immense area unusually rich in minerals and one in which, in consequence, mineral law assumes a particular importance. The Section was created by the Association in accordance with a recommendation of the Executive Committee, after more than three hundred members in attendance at the Denver meeting had signified their special interest in such questions and expressed a desire to cooperate with the new Section.

Before the Executive Committee met at Denver the proposal that it recommend the organization of the Section had been presented to it from various sources and supported by a variety of weighty arguments. As illustrative of some of the reasons advanced for the move, we quote from a letter submitted to the Executive Committee by a member from Texas who expressed the sentiment of a large number of lawyers who are particularly interested in the law as it concerns oil and gas. After stating that "the value of the petroleum produced yearly in the United States vastly exceeds the value of the wheat crop and vastly exceeds the value of the cotton crop," and giving other details showing the wide extent and immense importance of this branch of the country's mineral production, he said:

> As this industry has developed (and it is still expanding and growing) many new legal problems have arisen: new statutes are being passed to meet new conditions and new and perplexing questions are being presented to the courts. New legal phases of the marketing problem are concurrently arising. New and special tax laws are to be construed—gross production tax, gallonage tax and newly enacted franchise tax. The status of royalty owners has new aspects. New conservation laws and the extension of the police power must be considered and construed. The various geophysical methods that have been developed in the last few years and are still developing, having for their purpose the making of an examination of the subsurface of the land to detect the presence of supposed oil bearing or oil indicating structures by means of scientific appliances located on the surface, are already giving rise to legal questions that have never before been presented to the profession and with regard to which there are no legal precedents.
>
> In addition to the fact that the oil industry presents more novel and unsettled law questions than any other industry in our country today, we have present a confusing situation due to the fact that on many vital questions the courts of different states have reached different and conflicting decisions, so that an oil lease provision is construed in one way in one jurisdiction and immediately across the state line in the next jurisdiction it is construed in a different way. These and many other questions are now engaging the attention of thousands of lawyers and the solution of these various problems affects not only the oil and gas companies and royalty owners, but the general public as well.
>
> The proposed section will offer an opportunity that has not yet been presented for the lawyers of the country to study the problems of the industry. Such discussions ought to assist our courts and should result in a more uniform construction of various state laws and lessen the expensive confusion now existing.
>
> From the standpoint of the American Bar Association the establishment of such a section should be in every way beneficial. We have listed some twenty-two oil and gas producing states; the lawyers in these states, in the main, have not shown as active an interest in the Association as the lawyers of some of their sister states. . . In our judgment, the creation of this new section would be of particular interest to a great many lawyers who are not now members of the Association and would draw the bar of the large number of oil producing states closer to the Association with the result that the influence of the Association will be greatly broadened and increased.

The meeting to organize the section in pursuance of the authorization of the Association was held on the morning of July 15th, at the Brown Palace Hotel. Mr. Josiah Marvel was made temporary chairman, and on motion appointed a nominating committee to present a list of regular officers. Messrs. Paul Howland of Ohio, Charles Liles of Missouri, Jefferson Chandler of California, Frank A. Kemp of Texas, John B. Sanborn of Wisconsin, and T. A. Noftzger of Kansas constituted this committee, which after a brief consultation presented the following nominations: Chairman, John C. Townes, Houston, Texas; Vice-Chairman, Gurney E. Newlin, Los Angeles, California; Secretary, Peter Q. Nyce, Washington, D. C.; Treasurer, W. H. Francis, Dallas, Texas. Members of Council—Earle W. Evans, Wichita, Kansas; J. S. Harold, Shreveport, Louisiana; Jefferson Chandler, Los Angeles, California; William H. Ferguson, Denver, Colorado; James F. Whalen, Pottsville, Pennsylvania; Hugh H. Brown, San Francisco, California; C. B. Ames, Oklahoma City, Oklahoma; R. F. Grant, Cleveland, Ohio. These were unanimously elected.

Chairman Townes thereupon assumed the chair and made a few brief remarks expressive of his appreciation of the honor conferred on him, of the importance of the subject with which the new Section was to deal, and of the real need which its organization met. Lawyers interested in mineral law had long felt that there should be some organization, some forum, in which they could assemble and discuss the legal problems arising out of this immense industry, the conflicting conservation laws of the various states, the conflicts in the decisions of the states, and cognate subjects. He appealed to all to support the Section and try to increase its membership as well as that of the Association. He suggested that it would be proper for the new Section to do what it could to assist the Commission which the President had appointed to study the problems of conservation and also to lend its assistance wherever possible in connection with the statutory enactments of the various states.

A motion to appoint a committee on By-Laws was passed, whereupon the Chairman named W. M. Crook of Beaumont, Tex., Jefferson Chandler of Los Angeles, and James A. Veasey of Tulsa, Oklahoma, on this committee. The draft of the By-Laws is to be sent to the members of the Section as promptly as possible for review and criticism, after which it is to be reported to the Section, which, in case it approves, will submit it to the Executive Committee of the Association. A motion that the next meeting of the Section be held the day previous to the meeting of the Association and at the same place was also carried. The Chairman was also authorized to appoint such committees, by and with the advice of the Council, as he thought necessary, to carry forward the work of the Section until the next meeting. Steps to determine which branch of mineral law the various members were particularly interested in were also taken, with a view to organizing the work.

DENVER MEETING BREAKS ATTENDANCE RECORDS

(*Continued from page 532*)

of the Volstead act and the operation of the Eighteenth Amendment was well received.

Chairman Rogers then announced that Hon. George W. Wickersham, of New York, Attorney General under President Taft, and now President of the American Law Institute, would speak in place of Mr. Richard Washburn Child, who had found it impossible to be present. Mr. Wickersham gave a brief but interesting account of the National Crime Commission and what it was doing to get facts, distribute information and encourage organization in dealing with the crime problems. There had been a great deal of talk about crime and there had been a good deal of legislation increasing the penalties, but comparatively little had been done to ascertain the underlying causes of the existence of crime, and no reliable nationwide statistics existed from which it was possible to determine what the present situation was throughout the country.

Mr. Wickersham commented on certain rather encouraging statistics furnished by the Secretary of the Welfare Bureau of Pennsylvania, to the effect that there had been a marked decrease in serious crimes since 1910 and a marked increase in percentage of convictions since that time. He also called attention to a statement of Dr. Hoffman that a considerable number of crimes were due to the carelessness with which people of property spread temptation before the eyes of people less fortunate than themselves. This was such a simple and obvious thing that it had generally escaped lawyers, but it evidently had much to do with crimes against property. Finally, crime came as an expression of the social life of the people, and back of this of course was the home, religion, the relations between members of the family, and if we found that these had not the binding and helpful influence which they have had in the past, we must naturally expect some great change. It was a subject for profound consideration whether the modern tendency of our lives was such as to maintain that honor of the father and the mother which was the basis of the Biblical promise.

Work of State Crime Commissions

Chairman Rogers then announced that there were present two or three members who had been connected with specific crime surveys in America and they had been invited to say a few words. He first introduced Hon. J. Weston Allen, member of the National Crime Commission and formerly Attorney General of Massachusetts. Five concrete duties, in Mr. Allen's opinion, confronted the bench and bar: First, the arousing of public opinion; second, aiding in the detection and apprehension of the criminal by modern scientific police organization; third, restoring the virility and supremacy of criminal jurisprudence; fourth, holding fast to all we have gained affecting the treatment of the criminal against the onslaught of the hysterical demand for extreme penalties; fifth the defense of the Constitution of the United States.

He spoke briefly on the necessity of arousing public opinion and the other points above referred to, but devoted himself chiefly to the necessity for the maintenance of modern and scientific methods in the treatment of the criminal. The hue and cry against probation and parole, he declared, must not be allowed to sweep us from our moorings. "And as coming from Massachusetts," he continued, "let me give an answer to some of the statements that are made calling upon the people to demand extreme penalties. Massachusetts originated the idea of probation in 1872 when the word probation was first written in the criminal law; and it was done by the Commonwealth of Masachusetts in relation to only a single court in the city of Boston. Since then it has been extended to police and criminal courts.

"Since that time England has taken up the work which Massachusetts began, and today probation in England is being advanced in a rapid manner.

"The last session of Congress introduced probation into our federal criminal procedure, and used the exact language of our Massachusetts statute.

"Up to the end of the last century Massachusetts was the only state government on the face of the earth that had this feature for its law. What has come of it? Leaving out of the tabulation drunkards, vagrants, and those who do not complete their term of probation, said probation covering the years 1914 and 1915, the study being made in 1923 and 1924, nine years after those probations had been granted, we find that of those who were carried through their probationary period and discharged in their community, seventy-four per cent have never again appeared in any criminal court of Massachusetts, and ninety-seven per cent of them have never committed any offense causing them to be committed to a penal institution. Eighty-three per cent of them were found to be locally employed and aiding society.

"On the 30th of September, last year, there were 891 persons locked up in institutions of Suffolk County, and on that date there were 6,950 cases who had been convicted of crime. In the penal institutions we have 891, and seven times as many who are out on probation in the community. Do you think that is alarming?

"A gentleman asked me yesterday why it was that the City of Boston had such a small percentage of crime compared with other cities in this country, and perhaps that is the answer.

"I only wish to say further one thing, because I think this is vitally important, that in the city of Saint Louis in 1925 there were one hundred murders. There were nineteen in Boston. There were 1,897 hold-ups in the city of Saint Louis. There were 214 in Boston. I call this to your attention because of the fact that in the city of Saint Louis today they have no corresponding process for caring for adult offenders in the open. I thank you." (Applause.)

"A Jazz Generation"

Chairman Rogers next introduced Mr. Bert M. Hardenbrook of the Nebraska Crime Commis-

sion, who discussed the crime situation in Nebraska, and the remedies. They had a legislative program in his state which was much the same as that presented that afternoon by Mr. Thompson of St. Louis in his address on "The Missouri Crime Survey." There was, however, a human element which entered into the solution of the crime situation that demanded attention. We are living in a jazz generation. We have jazz divorces, jazz sympathy with crime, jazz dances, jazz lawyers, jazz alienists and jazz law enforcement. This fact has something to do with the situation that confronts us.

Mr. Walter K. Tuller, Chairman of the California Crime Commission, was next introduced. He stated that the California Commission had prepared and would report a new Code of Criminal Procedure to the next session of the Legislature. This new code had been drawn on the theory that the prime object of the law of procedure was not to protect the man accused of crime but to give the law-abiding citizen the fullest possible degree of protection. He mentioned a few of the principal points.

Mr. Thomas H. Franklin of San Antonio, Texas, emphasized the responsibility of the law-abiding citizenship of the country for the enforcement of the law. No law could ever be enforced when that citizenship proclaimed that it could not be, because when that word went to the criminal he got all the encouragement he wanted. Neither could any law be enforced if the power of enforcement was placed in the hands of its enemies. Appeals for changes in law and procedure would avail little if the personal equation in the administration of the criminal law was neglected.

Third Session

At the beginning of the third session President Long announced, amid applause, that there had already been registered 1,923 members in attendance at the meeting, exceeding by 100 the largest registration heretofore, which was in Detroit. This total, of course, did not include the ladies, except such as happened to be members. He then introduced Hon. George T. Page, of Illinois, former President of the Association and at present Judge of the Seventh Circuit of the United States, as the presiding officer.

Chairman Page introduced Hon. James M. Beck, the speaker of the evening, who delivered a scholarly address on "The Future of Democratic Institutions." Democracy as a form of government is at a low ebb in the world today, Mr. Beck declared, but as a social spirit it is at high tide. The significant reaction in many nations against democracy and in favor of one-man power is not a revolt against democracy as a social ideal but against the inefficiency and venality of parliamentary institutions. We should not be discouraged by these phenomena, however. Human progress moves in a constant series of ascending and descending curves or, to vary the metaphor, its forces are at times centripetal and at times centrifugal.

A greater danger even than this was the tendency to substitute referendums for the deliberate actions of legislatures. Another serious danger was the increasing disintegration of the party system. It should not be forgotten that democracy was a means to an end and not an end in itself. In weighing the institution, however, care should be taken to distinguish between the "ponderables" and the "imponderables." When the latter were given due weight, democracy justified itself because in an age of education it was the only system consistent with self-respect.

The Secretary then read the list of members of the General Council as reported by the different state delegations and these were elected. The list of Vice-Presidents and members of the local councils had also been filed with the Secretary, and these were approved by the Association.

Fourth Session

The fourth session was held in the Broadway Theatre, adjoining the headquarters hotel. Hon. George W. Wickersham, of New York, made a report on "The Progress of the American Law Institute," in which he summed up in a highly instructive manner details of the work of this organization, which have appeared in previous issues of the AMERICAN BAR ASSOCIATION JOURNAL. The report of sections and committees was then taken up.

Chairman Oscar Hallam, of St. Paul, reported for the section on Criminal Law. The attendance at the meeting of the section had been larger than usual, and the members had listened to able addresses by Mr. Charles A. Boston, of New York, on the general aspects of the crime problem, by Judge C. C. Butler, of Denver, on the administration of Criminal Justice in Denver and Colorado, and by Arthur V. Lashly, of St. Louis, on the methods and results of the Missouri Crime Survey. These papers had been followed by discussions. The section had provided for a council of five members, with the officers of the section as ex-officio members, to carry on the work of the section, between the regular sessions of the Association.

It had also watched with interest, and had sought to cooperate with, the various agencies working for better law enforcement. He enumerated the principal of these agencies and added these voluntary movements signified a widespread conviction that official instrumentalities were not measuring up to their full duties, but on the other hand, they were a healthy sign that American citizens will, under conditions of necessity and if properly appealed to, rise to their full duties of citizenship. The section believed in much, though perhaps not in all, that had been said in the discussions on crime on the program. Unfortunately there was very little exact information either of a general character, or as to any considerable number of localities. Comprehensive statistics of crime should be gathered and kept up to date year by year. This work could best be done by the Census Bureau in the interest of generality and uniformity. It would cost millions to do it but it would well be worth the money. It was important to know what was done after the crime was committed and for this reason the section especially commended the research work such as had been instituted in Missouri, Chicago, Cleveland and Baltimore, following every major crime from the time of the original report of the crime to the final disposition of the case and in this way getting a complete history of the situation.

Research Work Commended

The remedy for infirmities in apprehension, prosecution and punishment depended as much

upon administration as upon statute. Yet improved statutes, simplifying processes requiring speed and simplicity of procedure, providing for certainty, adequacy and finality of just but not excessive punishment, would go far to accomplish results, and the section especially commended the active efforts in many states toward this end. There was undoubtedly a direct relation between crime and punishment, and punishment wisely inflicted would check crime. The section especially commended the research work that some of the law schools had undertaken and the extent to which they had loaned gratuitously some of the members of their faculties to carry it on. We were confronted by a grave problem, one that would nexer be wholly solved, but he had an abiding faith in the capacity of the American people ultimately to handle this crime problem at least as well as any other people in the world.

Secretary Robert P. Schick, of the Bureau of Comparative Law, reported for that section, in the absence of Chairman Smithers. He expressed the hope that there would be a more general interest of the members of the association in this work.

Chairman James I. Allread, of Ohio, reported briefly for the Judicial Section. Two sessions had been held and there were able addresses by Dean Roscoe Pound, Chief Justice Allen, of Colorado, Judge Burke, and Judge Dawson, of Kansas.

More Schools Admitted to Approved Classification

Chairman Silas H. Strawn, of the section of Legal Education, being absent on a government mission in China, Secretary John B. Sanborn, of Wisconsin, presented that report. At the last meeting of the American Bar Association, a resolution had been reported by the Section that the United States Supreme Court adopt rules for a special examination as to character and fitness of applicants for admission in the federal courts. That resolution had been transmitted to the Supreme Court, and at its request the Council of Legal Education had presented a tentative draft of such rules, which would be taken up at the next meeting of the Board of Circuit Judges for consideration. The Council of Legal Education had continued inspection of the law schools of the country and during the past year had admitted a number of new schools to the approved classification. There were now sixty-four schools on the approved list.

The Council had also abolished what is known as the Class B list. That had been put in as a temporary measure to indicate that certain schools expected in the near future to comply with the American Bar Association standard. The Council felt that the temporary list had served its purpose and that hereafter it should only issue a list of approved schools that had fully complied with the standards. The Council had also continued to endeavor to bring to the attention of the prospective law students the classification of schools and the standards recommended by the American Bar Association, and it asked the aid of the members of the Association in reaching as many prospective students as possible. During the past year two states had substantially adopted the standard for admission to the Bar recommended by the American Bar Association—Ohio and Wisconsin.

Patent Section's Report

Chairman Arthur C. Fraser, of New York, reported for the Section on Patents, Trademarks and Copyright Law. The section had been occupied during the past year in an effort to secure the enactment by Congress of the bills amending the Trademark law, the patent statutes and the Judicial Code concerning certain patent suits, which bills had been approved by the Association at the Philadelphia and Detroit meeting. It had also been considering proposals for the further improvement of the patent statute, and had been concerned with bills pending in Congress for the amendment of the copyright law and for protection of industrial designs by copyright legislation. However, no final action was taken by the section on these matters, and it was only necessary to report progress.

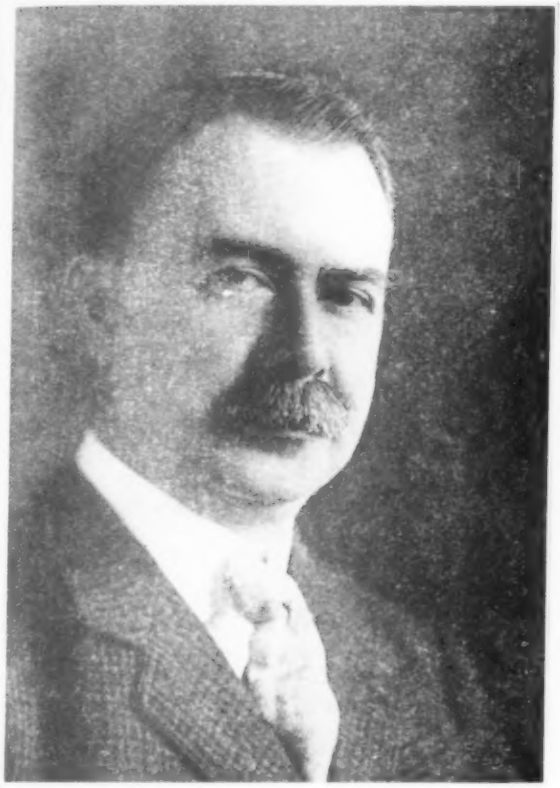
Chairman Fraser gave the legislative history of the Trademark Bill which had been approved by the Association in July, 1924. The House Committee on Patents had held hearings on it in March of the present year, and these had resulted in certain amendments being proposed by the Association's committee and tentatively approved by a majority of the House Committee. However, there had been no final action by the House Committee before the adjournment of Congress. The bill as amended had been printed before the meeting and was recommended to the Association for its endorsement. The bill amending section 52 of the Judicial Code, which the Association had approved at Detroit, had passed the House of Representatives with slight amendments and was now before the Senate with favorable prospects for its passage at the next session of Congress. The bill for the amendment of the patent law approved by the Association in Detroit had been introduced, but at a hearing of the House Committee on patents it became evident that the committee would not report the bill in the form presented. The committee on legislation of the section had thereupon endeavored to reframe the bill so as to overcome objections, with the result that another bill had been introduced by Mr. Vestal, Chairman of the House Committee on patents as H. R. 12368. The section had discussed this bill very carefully and approved it with certain amendments which were found acceptable to the Commissioner of Patents and had recommended its approval by the Association.

Chairman Fraser called attention to certain sections of the bill cutting down the two successive appeals in the patent office to one and substituting for successive proceedings in review of the patent office decision an alternative procedure at the election of the rejected applicant. After further discussion of the details of this bill he moved that the Association approve the report, which was carried unanimously.

Uniform State Laws Proposed by Commissioners

Mr. George B. Young, of Vermont, President of the National Conference of Commissioners on Uniform State Laws, and chairman of the Association's committee on that subject, presented its report. Prior to the meeting the committee had prepared a brief report suggesting certain acts that would probably be approved by the Conference and recommending their final approval by the Association. Since that was written the Conference had been in session and had approved five acts, including the motor vehicle code, which consisted of four separate acts. These were: The act for the filing of federal tax liens; uniform chattel mortgage act, which is the result of several years of careful consideration and conference with various organiza-

New Members of the Executive Committee Elected at Denver



EDWARD A. ARMSTRONG
Elected Chairman of the General Council

FRANK PACE
Elected Member of Executive Committee

JAMES E. AILSHIE
Elected Member of Executive Committee

J. WESTON ALLEN
Elected Member of Executive Committee

tions interested in it; a uniform extradition act; an act regulating the sale and use of firearms, which follows in a general way the recommendations of the Revolver Association, and has been considered by the Attorney General and by various other persons and organizations; the uniform motor vehicle code, which has four divisions: First, that relating to the registration of motor vehicles; second, that relating to certificate of title or anti-theft provisions; third, that requiring the licensing of drivers and chauffeurs; fourth, the general rules regulating the use of the road and the equipment of motor vehicles.

All these acts had been carefully prepared by special committees, aided by draughtsmen expert on the subject, carefully canvassed by these committees, and finally reported to the Conference where they were debated section by section on the floor and recommitted to the committees, which reconsidered them and brought them back to the Conference, where they were again debated before receiving the final approval of the Conference. The Uniform Motor Vehicle Code was the result not only of the work of the National Conference for a good many years, but was due to the cooperation of the National Conference on Street and Highway Safety which had held two meetings during the past two years, at the call of Secretary of Commerce, Herbert Hoover. There had been seventy-five of the commissioners present at the recent meeting representing betwen thirty-five and forty states. He moved that the Association approve each of these acts, which was done.

Vice-Chairman J. F. McLane, of Utah, reported that the section of Public Utility Law had held its regular meeting, transacted its routine business and listened to a number of interesting addresses. A matter of particular interest to the section, which was now before the Conference on Uniform State Laws, was the proposed uniform public utility act, which, however, was still under consideration.

Annotated Canons of Professional Ethics

Chairman Charles A. Boston, of the Special Committee on the Supplements to the Canons of Professional Ethics, made his report. He called attention to its recommendation as printed, "that the Executive Committee be empowered to consider, and if it approve, to announce to members through the Journal or otherwise, a plan whereby those desiring to do so, may purchase at cost the Annotated Canons, prepared by the Chairman for the use of the committee, before the type is distributed." He said that he had prepared this annotation of the canons, which was probably the most complete annotation of Canons of Ethics that had ever been attempted, as a foundation for the work of the special committee and in order that it might approach its affairs intelligently.

This document included, he said, under the appropriate canons of the Association, all the decisions which were obtainable of committees on professional ethics in this country. It also contained all the canons of ethics not heretofore reported to the Association which had been adopted by individual associations and state bodies empowered to adopt them. It further contained much explanatory matter and cognate decisions of the General Council of the Bar of England on topics with which our canons dealt, as well as decisions of the Council of the Law Society of England. It was also fully indexed and contained a bibliography of thirteen pages. Although this had been prepared for the use of the committee only, the members thought it would be a pity if the type were distributed without an opportunity being given the members of the Association to subscribe for it practically at cost. The cost would vary with the number of the subscriptions.

President Long called attention to the fact that the Executive Committee had already acted favorably on this part of the Committee's recommendation and its report had been adopted by the Association, so that no further action after that was necessary. On motion the committee was continued.

Record-Breaking Registration

At this point President Long announced that the registration of the meeting was now over 2,000, which was far above the registration of any previous meeting. Mr. Platt Rogers of Denver, was recognized. He stated that he had been endeavoring to learn the names of all present who had been in Denver at the annual meeting in 1901, and he asked the assistance of the members in making a complete list. He also invited them to a reunion at his house and to lunch.

Mr. Province M. Pogue, of Ohio, Chairman of the Committee on Commerce, Trade and Commercial Law, reported that members of his committee had appeared in Washington a number of times within the past year urging the passage of certain pending bills. The committee had also met in New York City and held hearings which extended over the greater part of a week, during which various persons had addressed the committee on the subjects under consideration. Chairman Pogue stated that his committee had under consideration the question of a national act on the subject of industrial disputes, and believed that during the year it would be able to work out and present a constructive legislative program.

On motion the Association adopted the committee's recommendations that it reaffirm its approval and urge the enactment of an "Act Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce," introduced as Senate Bill 2792 and H. R. 8944 in the 69th Congress; that the Association adopt and approve the bill substantially in the form presented, "Relating to the Carriage of Goods by Sea," and comprehended in House Resolution 11447 of the 68th Congress; that the Association readopt and approve resolution eight of the 1925 report of the committee, as modified herein, "providing for the payment of interest on judgments rendered against the United States for money due on contracts." No action was taken on the committee's recommendation that the Association adopt and approve a bill relating to "The Apportionment of Damages in Cases of Collision where more than one Vessel is at Fault, and Limiting the Time for Bringing Suits," Mr. Miller having raised the point of order that the Executive Committee had reported a recommendation that this particular proposition be referred back to the committee on Admiralty and Maritime Law and that

the matter had been disposed of by the adoption of its report.

Chairman Pogue then asked that the second, sixth, seventh and eighth recommendations of the committee be referred back to it so that it might be able to determine under the amendments that had just been made what was comprehended within the committee's sphere of action. Mr. Miller suggested, in view of changes in the jurisdiction of the various committees, and particularly in view of the abolition of the committee on Commerce, Trade and Commercial Law, that Resolutions Six and Eight be referred back to the committees having these matters in charge under the recent amendments. Mr. William Marshall Bullitt, of Kentucky, rose to inquire what was the object of referring the question of motor vehicle legislation back to a committee of the Association—this question being dealt with in Resolution Seven referred to by Chairman Pogue—when the Association, as he understood it, had already signed a blank check, without consideration of the matter, in favor of the Uniform Law proposed by the National Conference of Commissioners. Mr. Miller called attention to the fact that his motion did not refer to this particular resolution, after which it was adopted as he had proposed it.

"A Blank Check"

Mr. Nathan William MacChesney, of Illinois, took exception to the use of the expression "a blank check," because he thought it would be unfortunate in the adoption of the Uniform Motor Vehicle Code to have the impression get abroad that it had not been given thorough consideration, with the approval from time to time of the Association. The Uniform Motor Vehicle Code had been under consideration for nearly twelve years by the National Conference of Commissioners on Uniform State Laws, and in preliminary reports and in published acts in the proceedings of this Association it had been before this body. The Chairman of the committee of this Association had reported it in four separate years to the Association for discussion and consideration. The Secretary of Commerce in 1924 had called the First National Conference on Street and Highway Safety, and in it the Association had been represented as well as the National Conference of Commissioners on Uniform State Laws. After a full consideration, it was there determined that the subject matter was a proper one for state and not federal regulation. That matter had come before this body and as a result of a discussion of that specific question it was referred back to the National Conference of Commissioners on Uniform State Laws, which thereupon prepared a report, which was then submitted to the second National Conference on Street and Highway Safety, debated by your committee, debated by the National Conference of Commissioners on Uniform State Laws, and had now come back to the Association where it had been approved. He submitted that the matter ought not to be given further consideration by the American Bar Association, as it had already been amply considered, and he hoped that the resolution would be laid on the table.

Chairman Pogue expressed the opinion that the matter was one which properly belonged to the committee on Commerce under the new amendment, and he read the new provision in support of his views. The work of his committee related to interstate commerce and did not cover the subject of the action by the Conference on Uniform State Laws. His committee was endeavoring to work out matters that related to interstate commerce and that could not be affected by the Conference. General MacChesney briefly replied, in support of his position. Mr. Harvey F. Smith, of West Virginia, expressed the view that there could be no control of this question by the state and that the only solution lay in federal action.

William Marshall Bullitt, of Kentucky, declared that unless the Association proposed to abrogate its functions entirely in favor of the Commissioners on Uniform State Laws, it ought at least to reserve to its own committees consideration of this subject. In conclusion he inquired of Mr. MacChesney what voice the Association or its members had had in reaching the decision that was reached by the Conference on Uniform State Laws? Whether it was wise for the Association to continue to contribute large sums of money to the conference? Whether or not some committee should be appointed to consider and report at a future meeting whether the Association should continue the subsidies it was paying to the Conference, in the decisions of which it really had no voice?

Mr. W. H. Washington, of Tennessee, spoke briefly in favor of the action of the Conference and appealed to the body to stand by the action already taken. Mr. MacChesney replying to the inquiries of Mr. Bullitt, gave details showing that the Association had been represented in the consideration of the Acts. He also spoke briefly of the work of the Conference and expressed the opinion that, in view of its close relations with the American Bar Association, the appropriations for it should be greatly increased. On a vote Resolution No. 7 of the report of the committee was lost.

Professional Ethics Committee Reports

Mr. Thomas Francis Howe, Chairman of the Committee on Professional Ethics and Grievances, wished to call the attention of members to two matters which had had serious consideration at a meeting of the committee in Denver. It had become apparent to members of the committee that while the standards of business ethics throughout the country had been steadily advancing, professional standards had not only not kept pace with the advance, but had probably been steadily lowering. That was particularly apparent in the legal profession from the commercialization of the practice of law. The committee had taken steps to deal with the problem in two ways—both from an educational standpoint.

It had found that the study of professional ethics was only an optional course in a vast number of the accredited law schools, and it had therefore adopted a resolution that it should undertake, in cooperation with the section of legal education and the Association of Accredited Law Schools, to consider whether these schools might be induced to include the subject in their curricula as a compulsory subject: and that it should further consider what could be done in this respect with other law schools not included in the accredited list. It had occurred to the committee that perhaps one of the reasons these other law schools did not include the subject in their curricula was the fact that they did not have conveniently at their disposal the means

of obtaining instructors on it. It felt that that objection could be met if qualified members of the Association in the various communities where the law schools are located would volunteer to assist the schools by a series of lectures on professional ethics. The committee was therefore going to prepare some data to assist those who were willing thus to volunteer for the work, and it would be glad to have such volunteers communicate with it.

Lawyers and Lay Intermediaries

The second subject considered was the commercialization of law particularly in respect to the relations between lawyers and lay intermediaries. These interfere with that personal relation of lawyer and client which should exist according to all traditions of the profession, but which does not exist in many cases today. Members would probably be surprised at the extent to which the tendency to bring about a supposed standardization of the furnishing of legal services had gone. However, this could happen only because some lawyer was cooperating with the plan, and if the Association could educate the lawyer to a realization of the standard he should have, it would have accomplished much. The committee asked the cooperation of all state bar associations in a consideration of the subject, and it intended in the near future to have a conference that would go into the question at considerable length and see what could be done to check this tendency.

Mr. Edward T. Lee, of Illinois, inquired if the committee had ever given attention to what might be called the wholesaling of the law. We had in all our big cities today what you might call department stores of the law. He would like to know whether the young men who are employees of such firms are lawyers in the proper sense. Mr. Howe replied that the committee had not given much consideration to that question because it presumed that the lawyer associated with such a firm was in that personal relation which should exist between lawyer and client. That did not necessarily mean a personal relation with the head of the firm. He did not think that was the evil the profession had to meet. The evil was the lawyer who was selling his services to somebody else through a lay intermediary.

Conference of Bar Association Delegates

Chairman Marvel of the Conference of Bar Association Delegates presented a brief report. He told of the organization of the Conference along lines suggested some years ago by Elihu Root and something of its method of work for the benefit of new members of the Association. The underlying idea was that there should be some direct personal connection between the American Bar Association and the various state and local associations. It had followed the policy of the American Bar Association and attempted to be of service in carrying its message back to the various state and local associations. Its committee on Judicial Selection had provided for a representative in every state in the union to carry forward the association's policies in that respect. The Conference had on yesterday created new committees on the Judicial Council and the Rule-Making Power in order that the views of the association might be carried back to the states. Its committee on Admission to the Bar had been active and the committee on Organization was going back to the associations at home and endeavoring to arouse in the minds of lawyers everywhere the ideal of a developed professional duty and consciousness that we ought to have to a greater extent throughout the country.

Chairman Eckert of the Committee on Publicity reported the activities of that body during the past year. Digests of the committee reports and of the principal speeches to be delivered at the annual meeting had been transmitted in advance to the press of the country. In addition, the editors or owners of the principal newspapers in the cities were either interviewed personally by members of the committee or urged by letter to give sufficient space to the proceedings of the annual meeting, in view of the wide public interest in the matters to be there discussed. He expressed his deep appreciation as chairman of the assistance that had been rendered by Miss Mary Lathrop of the Denver bar in connection with the publicity of the meeting in progress, and also of the efficient services of Mr. James C. Marriott, publicity representative of the Association.

Membership Goes Over 25,000

In the absence of Chairman Wadhams of the Membership Committee the report was read by Mr. R. A. Van Orsdel of Nebraska, a member of the committee. A total of 1,735 new members had been added from August 15, 1925, to June 21, 1926. Losses in membership during this period from deaths, resignations and dropped amounted to 1,055. The total membership on the latter date was 24,247. As the report was closed before the results of the campaign for new members in certain states were known, it may be stated here that later additions to the roll raised the membership of the Association well above the 25,000 mark.

Secretary MacCracken reported from the Executive Committee the resolution introduced by Mr. Butler at the first session, to elect Simeon E. Baldwin, Alfred Hemenway and Francis Rawle, the three surviving members of the Conference at Saratoga at which the Association was founded, life members of the Association and to invite them to attend the Fiftieth Anniversary meeting in 1927 as the guests of the Association. The Executive Committee had amended the resolution so as to exempt these gentlemen from the payment of the regular life membership dues and slightly altered the verbiage, with the consent of Mr. Butler. It was unanimously approved by the Association.

The Secretary also reported that the Executive Committee recommended that the Association establish a section to be known as the section of Mineral Law. The announcement was received with applause. The Secretary added that several hundred applications for membership in the proposed new section had already been filed. On motion the recommendation was adopted.

Judge Meldrim of Georgia announced that the member of the General Council from Georgia had been called home and moved that Mr. Shelby Myrick, senior member of the local council from that state, be elected to serve during his absence. After some discussion as to the precedents for this method of filling vacancies on the General Council temporarily, Judge Meldrim's motion was carried.

Secretary MacCracken announced on behalf of

the General Council that Mr. Edward A. Armstrong of New Jersey had been unanimously elected chairman of that body. President Long presented the new chairman to the Association, and he was liberally applauded. The Secretary then presented a list of eighteen names of applicants for membership, all of whom had been regularly passed on and approved, and they were elected.

Fifth Session

This session was also mainly devoted to the reports of sections and committees. Chairman F. Dumont Smith of the American Citizenship Committee presented its report. He prefaced it with the announcement that the special committee appointed by President Long to examine and recommend proper reference books on the Constitution, had completed its work and the report was available at headquarters. The special committee's appointment had resulted from a suggestion to the Executive Committee at the meeting in Los Angeles last January, by Mr. Chandler of that city, a leading editor and one of the chief supporters of the oratorical contests on the Constitution, that one of the chief troubles with the young debaters was the lack of information as to suitable reference books.

Teaching the Constitution in Law Schools

As to the committee's report, he first wished to touch on the education of the lawyers as to the Constitution. Lawyers were of course compelled to take an oath to support the Constitution. Members of the Association felt that when they took an oath to support that instrument they pledged themselves to expound, explain and defend it when called upon. Did the law schools of the country fit the graduating lawyer to understand that part of the oath? The committee did not think so. So far as they had been able to learn, with a single exception, no law school in the country taught more than the commercial aspects of the Constitution. He had personally examined the courses of study of twenty-five law schools that teach the contract clause, the commerce clause, the Fourth, Fifth and Fifteenth Amendments, due process, and the like of that. In other words, they teach the lawyer how to make money out of the Constitution, but not how to explain and defend it. "None of them teach the young lawyer the historical background of the Constitution, the peculiar dual form of government, the necessity of preserving the balance of power between the states and the federal union, and above all the necessity of an impartial tribunal to expound its doctrines."

There was but one way to reach the young lawyers and that was through the boards of law examiners of the various states. The committee urged the lawyers of the Association to bring their influence to bear on boards of examiners to induce them to require that every person applying for admission to the bar should submit to an examination on the Constitution—not the commercial side of it, but upon it as a governmental instrument, as the most complete and perfect instrument of human government ever devised. Another important part of the business of the committee was to awaken the citizens to their duties as well as their rights —particularly their duty to vote. He expressed appreciation of the assistance of the state citizenship committees, which had sent out thousands of pamphlets and otherwise cooperated.

Law Schools Defended

Judge Andrew A. Bruce, of Illinois, took exception to certain of Mr. Smith's remarks concerning law schools. He observed that he was a member of the first citizenship committee and perhaps had something to do with starting the movement. There were charges made in the report which were extravagant, which were not true, and he would leave that to every recent graduate of the law schools of the country. "We gain nothing in this campaign for American citizenship by exaggeration," he continued. "The truth is bad enough. I agree thoroughly with Senator Smith in his recommendation that that Bar Examiners should make the Constitution and the history of the Constitution a prerequisite to admission to the Bar. But there is no wisdom or justice in really insulting the leading law schools of the United States — Michigan, Harvard, Yale, Columbia, Chicago and the others— by saying they are not teaching the Constitution or by making false statements about them.

"The fact that the printed catalogues do not chronicle the whole curriculum means nothing more than the fact that a railroad time table gives you only the principal towns between Chicago and Denver; because it does not mention all the intermediate towns it does not follow that you do not pass through them. I venture the assertion that Senator Smith with all his wisdom—and I bow to him, I have used his writings—has not visited our law schools. It is not true to say because we emphasize the Fourth, Fifth and Fourteenth Amendments and the Commerce Clause of the Constitution, that we teach from those clauses merely the commercial aspects of the Constitution. Those amendments touch every phase of constitutional government and every phase of our history, and I will leave it to any law school graduate of the last ten years of an American law school, and I think they will bear me out in saying that though perhaps many schools do not teach the Constitution as it should be taught, the great majority of the schools do teach it."

Amendments to Citizenship Report Presented

Judge Bruce thereupon offered an amendment to the committee's report qualifying the generality of the assertion as to law schools by inserting the words "many of" before "law schools." Mr. Smith here arose and said that this was not a matter of argument but of demonstration. If any law school in the country would send him its course of study showing that it taught the Constitution as he had defined its teaching, he would make a public apology through the pages of the Journal. However, he had no objection to the first amendment. Mr. Bruce thereupon offered another amendment: to strike out of the committee's report the statement, "we have examined with care the courses of study of the leading law schools of the country. They teach by decided cases something about the contract clause, interstate commerce, the Fourth, Fifth and Fourteenth Amendments." Mr. Smith objected to this. The statement as a whole had been carefully considered by the committee, including Mr. Beck, who was then in London. After a further

brief colloquy the amendment was put to a vote and failed of passage.

Mr. Shearer of Minnesota offered a resolution enlarging the Committee on Citizenship to seven members and granting it power to study and ascertain the reasons for the failure of citizens to vote at elections and to report to the Association what remedies, if any, may be constitutionally devised to secure a more general exercise of the elective franchise at elections. The resolution was referred to the Executive Committee.

Chairman James Brown Scott reported for the Committee on International Law. He wished to call attention to three matters touching current international affairs. First, the Locarno Treaties adopted last October, by which certain of the European powers entered into specific agreements to preserve their territorial integrity and to settle any disputes that may arise among them by a resort to commissions of conciliation, tribunals of arbitration, and the Permanent Court of International Justice. If these agreements were lived up to, disputes that have in the past jeopardized our common civilization will be adjusted by peaceable means instead of by a resort to arms.

The second matter was the remarkable progress that had been made in regard to codification. A few years ago a committee was appointed by the League of Nations to consider the subjects that might be ready for codification. That committee had met and agreed upon a list of subjects, and transmitted to the different governments a series of projects for the expression of opinion. Also in the last few years the Pan-American Union representing twenty-one governments had seriously undertaken a codification of international law, and a series of projects had been presented to the governing board of the Union and by it transmitted to the governments, with the further direction that they be submitted in the month of April of the coming year to the meeting to be held in Rio de Janeiro.

Lastly a word of congratulation to all who believed in a rule of law governing the relations of nations. Little by little in discussion and conference, little by little in codification, the empire of law was being extended in the domain of matters which were formerly considered political and are now known to be subject to judicial discussion and settlement. The third observation he had in mind was that the culmination of all this would be the submission of projects of this kind to an international conference which might meet at some time agreeable to the nations invited to participate, so that by agreement the law of nations to be applied in their international intercourse and in the adjustment of their difficulties should be known in advance and the results so far calculated as to enable the governments to submit their disputes to judicial processes.

Law Enforcement Committee Reports

Chairman Charles S. Whitman of the Law Enforcement Committee said that his report would be brief as the committee was about to commit what our Japanese friends might call "hari-kari." He touched on the task assigned to the committee on its organization in 1921 and mentioned the investigations undertaken and the reports made at previous meetings of the Association. At Minneapolis the committee had been instructed, if sufficient funds could be obtained, to undertake the preparation of a model penal code or to cooperate with other organizations to that end. It found that the work committed to it in this field was likely to be carried on successfully through another organization. The American Law Institute had undertaken this important task—in the opinion of the committee the most important task that lawyers could underake at the present time in the interest of the enforcement of criminal law. The committee believed the American Law Institute was very well equipped to accomplish it. Its work thus far had been of a very high order. The general subject of criminal law of course fell within the sphere of the section on criminal law and the committee had been desirous of encouraging that section in every possible way. The committee had accomplished as far as its ability permitted the work that had been assigned to it and it asked that it be discharged.

President Long here remarked that in the absence of action by the Association continuing the special committee—which the committee did not desire—it would lapse at the end of the meeting.

Government Liens on Real Estate

Mr. John T. Richards of Chicago, Chairman of the Committee on the Removal of Government Liens on Real Estate, made his report. He presumed few lawyers were ignorant of the fact that when a lien in favor of the government once attached to real estate, from whatever cause, there was no method by which it could be removed or released without the government's consent. That situation had brought about the appointment of the committee in 1913. He thereupon reviewed the earlier efforts to get a bill passed to provide a remedy. The latest bill on the subject was introduced at his suggestion in the senate last December by Senator Cummins. It passed the senate and was introduced in the House. Unfortunately some opposition had developed in the judiciary committee of the House and the bill was held up in the House. Chairman Richards gave a concrete illustration of the inconvenience and injustice resulting from the present state of affairs, and then briefly stated the grounds of the opposition that had arisen in the House. These were two: First, the bill which passed the senate gives exclusive jurisdiction to the U. S. District court in all cases where there is a government lien. Second, the bill provides that in case of decree for foreclosure in any case where the government has a junior lien, the sale shall not take place until ninety days after the entry of the decree, and in case Congress shall not be in session, that the District Attorney may by motion obtain a stay until ninety days after the convening of the next session of Congress. Objection to the long delay had been made, but its purpose was to give the government time within which to obtain a transfer or if necessary to take over the property in order to protect its lien.

Chairman Taft of the committee on Jurisprudence and Law Reform presented its report. The report was already in print and related to the legislative condition of various acts which had been recommended by the Association to Congress for a period of eight or ten years. Since the report was

filed some of these acts had made some progress but none had been passed by either house, except the Declaratory Judgment Act, which had been passed by the House of Representatives. At the last annual meeting the committee had been instructed to take up the subject of revising the circuits of the United States. The committee after investigation had reached the conclusion that there were so many interests involved, that a thorough investigation of the subject required study of so many lines—such as transportation, conditions of business in different parts of the country, as well as the interests of litigants and lawyers—that the subject could best be taken up by a committee of Congress.

He wished specifically to refer to a subject mentioned in the report viz: the congestion that had been caused in some of the district courts by reason of the fact that the appropriation heretofore made for the expense of naturalization in the state courts had been withdrawn, thus throwing the entire burden on the federal courts. Fortunately since the report was filed, and in accordance with one of its recommendations Congress had passed a bill providing that officers who perform the duties of Masters may be appointed out of the Immigration Bureau who may take the evidence in relation to such cases, although they cannot exercise the judicial function of issuing the necessary papers. This will relieve the courts of an enormous amount of work. Another interesting suggestion contained in the report was that, contrary to the general view of the matter, there are a vast number of minor statutory offenses which the courts are competent to decide without a jury. There was ample authority for the statement and the committee has recommended that it be inquired into, with a view to further relieve the congestion in the federal courts.

Abuse of Opinion Evidence

Mr. Taft then read a portion of the report dealing with the abuse of opinion evidence in criminal cases where insanity is pleaded as a defense, in condemnation proceedings and in personal injury cases. The committee had made certain concrete recommendations: that unless otherwise ordered by the court for good cause shown, none should call an "expert" witness before any action tried by a jury without having given, in advance of the trial and in writing to the court and other parties to the action, such notice as would enable them conveniently to prepare countervailing evidence; that the court should have power to call expert witnesses on its motion, with power to fix their compensation, same to be paid by the state; that the court should sum up such expert or opinion evidence as is adduced to the jury and might comment on its meaning and weight, and for this purpose might consult with any of the expert witnesses called on his own motion. In a very interesting case Judge Marcus Kavanagh of the Superior Court of Cook County, Illinois, had resorted to a method of procedure similar to that recommended by the committee. Copies of acts proposed in Massachusetts and California showed they were attempting in somewhat the same way to take at least the first step in the solution of this troublesome problem.

Of course it was expected that these proposals would meet with opposition. The conception of those who thought the remedy could not be found in this direction had been expressed in a decision by the Supreme Court of Michigan. The committee, however, was not prepared to acquiesce in the soundness of some of the views expressed in that decision, although it must be admitted that it was not without support in the tradition and law of our trial procedure. The American Medical Association had considered and indorsed the views expressed in the report of the committee. The American Psychiatric Association had also made recommendations quite similar to those approved by the committee. He moved that that Association instruct the committee to continue to promote the passage of the bills mentioned in the report as having been favored by the committee and heretofore recommended by the Association, and that it oppose the Caraway bill or any similar measure having for its purpose the abridgment of the powers of the United States judges in the conduct of jury trials. The motion was thereupon adopted.

Chairman Butler of the Committee on Federal Taxation regretted to report to the Association the death of Mr. Parker H. Hoag, a valued member of the committee. It had little to report except that it had attempted to watch legislation on its particular subject. The report had been printed in advance and was available to members. Most of the work mentioned in it had been done under the efficient management of Mr. George Morris, secretary of the committee, the chairman having been unable to participate on account of sickness in his family. All the committee had to ask was that it be continued. A resolution to that effect was passed.

Salaries of Federal Judges

Mr. A. B. Andrews of North Carolina, chairman of the committee on Salaries of Federal Judges, presented its report. It had three recommendations to make: that the committee be continued during the ensuing year; that it be authorized to do what it can to insure the passage of S. B. 2858 to fix the salaries of judges of the federal courts or like legislation; that the Association approve S. B. 2858 and direct the Secretary to send a copy of the resolution to every member of congress; and that such appropriation be made for the committee as will enable it to appeal at the proper time by letter to every member of the Association to write to members of Congress to support the pending bill and to enable the committee in other respects to render effective aid.

The committee had cooperated with the committee of lawyers, headed by Hon. Thomas Haight, former U. S. Circuit Judge for the Third District, in urging action by Congress. The bill previously referred to had already passed the senate and been reported out by the House Committee and placed on the calendar for action. However it had not been reached before July 2, at which time further consideration was deferred until Dec. 9. The only matter of interest he could add to the report as printed was that Rhode Island had this year added $2,000 to the annual salary of Supreme and trial court judges. New York had also increased the salary of district judges from $10,000 to $15,000, and had further continued the provision that Kings County and New York County should pay their

trial judges $7,500 additional. The recommendations of the committee were adopted.

"Greater Efficiency in Judicial Procedure"

After the report of this committee followed the symposium on Judicial Procedure. Mr. Robert Dodge of Boston thereupon delivered an address on "The Judicial Council," and was followed by Mr. Edson R. Sunderland who delivered an address on "Exercise of the Rule-Making Power," and by Mr. Roscoe Pound who spoke on "The Canons of Procedural Reform."

North Carolina Judicial Council

At the conclusion of these addresses President Long asked Mr. J. Crawford Biggs, chairman of the Judicial Council of North Carolina, to speak on the work of that body. Mr. Biggs stated that the North Carolina Act, passed in 1925, was modeled on the Ohio Act. The Council had been created "for the continuous study of the organization, rules and methods of practice and procedure of the State of North Carolina, and the practical workings of and results obtained by that system." The Council was composed of the Chief Justice and four Associate Justices of the Supreme Court, the twenty district court judges, the Attorney General and one practicing attorney from each judicial district appointed by the Governor for a term of two years, with the Chief Justice as the president. It was required to meet twice a year and report annually to the Governor on the workings of the system, with its recommendations as to changes needed, and the Governor was required to transmit this report to the General Assembly with such recommendations as he might deem advisable. The Conference may also submit recommendations in relation to the rules of practice and procedure for the consideration of the judges of the courts.

Chief Justice Marshall of Ohio spoke briefly on the necessity of casting aside useless forms and technicalities as a means of getting an efficient administration of Justice. He gave some concrete illustrations of how Justice could be expedited from his experience on the Supreme Bench of his state.

Secretary MacCracken then read telegrams from Treasurer Wadhams and Chief Justice Taft expressing appreciation of the messages that had been sent them by instruction of the Association. Secretary MacCracken, chairman of the Memorials Committee, then read the report of that committee, the audience standing until its conclusion.

Sixth Session

Hon. R. E. L. Saner, former President of the Association, presided at the sixth session. He introduced Hon. Thomas J. Norton of Chicago, who delivered an interesting and scholarly address on "National Encroachments and State Aggressions." His emphasis of the aggressions of the states on national prerogatives, on the courts, on commerce, on property, on liberty was no doubt a strikingly new point of view to an audience whose attention had probably been directed chiefly to the dangers from the national source. His address was listened to with close attention.

At the conclusion of the address Chairman Saner introduced the next speaker, Mr. Duncan Campbell Lee, an American lawyer who has been for the past twenty years a barrister of the Middle Temple, London. Mr. Lee was well known to many of the members of the Association who made the London trip on account of his genial activities in connection with that memorable affair. He was received with applause and proceeded to deliver a highly informative address on "Recent Changes in the English Law of property."

At this point Chairman Saner stated that he would call on President Long to extend a word of welcome to Sir James Aikins, President of the Canadian Bar Association, who was on the platform. At the conclusion of his remarks, the distinguished visitor was called on for a few words and he responded in his usual happy manner. He seldom permits an occasion to pass without doing his part to cement the cordial relations between Canada and the United States and contributing something to Anglo-American friendship. This occasion was no exception and the applause which greeted his brief words showed that the sentiments he expressed were also entertained by his hearers.

Seventh Session

President Long in the chair. No report was presented for the Committee on the Use of the Word "Attorney," and on motion this special committee was continued. Assistant Secretary Bentley read a supplemental report filed by the committee on the Revision of the Federal Statutes. It was with pleasure that the committee reported that H. R. 10,000, officially designated as "The Code of Laws of the United States," had been passed by Congress and signed by the President. The Act embodies all the general and permanent statutes of the Federal government which were in force on Dec. 7, 1925, and the volume containing the statutes consists of fifty titles with more than five hundred cross references designed to facilitate the use of the Code. The bill as finally passed numbers 1705 pages. No request being made for the continuance of this special committee, President Long announced that it would be discontinued at the end of the session.

In this connection he announced that the amendments made to the House Bill by the senate and agreed to by the House and which consequently are a part of the law, would be found in the July Journal. This bill, he added, is not a codification in fact. It is an assembling of the sections of the statutes. They are prima facie the law, but if there is a conflict between the provisions of any section of the Code and the corresponding portion of legislation heretofore enacted, effect will be given for all purposes to such enactments. He understood it was the intention of the committees of the senate and the house to revise the statutes of the United States by titles in the future, and this furnished a very convenient compilation for that purpose.

Thomas W. Shelton of Virginia, chairman of the Committee on Uniform Judicial Procedure, presented its report. He reviewed the present status of the bill empowering the U. S. Supreme Court to make rules for the law side of the federal courts. This had been set forth in the printed report and in a special article in the July Journal. The request which the committee desired to make of the members of the Association was that they endeavor to have their senators get in touch with the steering committee of the United States Senate and persuade

them to put the bill on the preferred list just as they did at the short session a year or more ago. He assumed everyone understood what the bill was about. The committee wished particularly to thank the vice-presidents of the Association for their assistance. It was through their aid that the committee had secured favorable responses as to the bill from eighty-five to eighty-six per cent of the senate and house. He believed if everyone would get behind the measure the bill could be brought up some time in December or January and put through. The report was adopted and the committee continued.

Resolution in Regard to Veterans Bureau

Assistant Secretary Bentley here presented a resolution which the Executive Committee recommended to the Association for adoption. It was drafted in response to a communication from General Frank T. Hines, Director of the United States Veterans Bureau, soliciting the sympathetic cooperation and assistance of the American Bar Association in solving the problem of securing proper guardians for the insane and minor wards of the government, the care of their persons and estates, uniform commitment laws in the several states and other guardianship and administrative problems. The resolution expressed the deep interest of the American Bar Association in the welfare of the mentally afflicted veterans of the world war and the minor children of those who gave their all for their country, and pledged its cooperation to the Veterans Bureau in solving the problems above mentioned. It further authorized and directed the President of the Association to comply with the request of the Director and nominate members of the Association for appointment by the Director as an advisory council for the Bureau and its Director on all legal questions connected with the guardianship of the insane and minor wards of the government. The resolution was adopted.

In the absence of Chairman Chamberlain, Secretary Bruce W. Sanborn of St. Paul presented the report for the Committee on Noteworthy Changes in Statute Law. The chief matter on which the committee desired action related to the lack of order and system in the indexes of the state session laws. It was well known to well-informed lawyers that the tools for finding what the statute law is are not at all comparable with those for finding the case law. There is pending in Congress a bill known as H. R. 9174 providing for an indexing by the Library of Congress of the state session laws so that there will be uniformity of nomenclature and arrangement and so that the law may be easily found. He wished to present a resolution by which the American Bar Association indorsed this bill, urged its immediate passage by Congress, and instructed the officers of the Association to send a copy of the resolution to the introducers of the bill and the chairmen of the committees before which it is pending and to aid in securing its passage. The resolution was adopted.

Mr. Levi Cooke, of Washington, D. C., Chairman of the Committee on Change of Date of the Presidential Inauguration, reported that the committee had merely repeated during the past year what it did during the preceding Congress. Reasons for submitting the constitutional amendment were presented and Senator Norris' resolution had passed the senate in a vote of 73 to 2. So far the House Committee has reported a similar resolution three separate times but it has not yet come to a debate or vote in that body. All the members of the House Committee and leading members of the House seem to be of the same opinion as the Senate. It was possible that at the coming short session of Congress the resolution would be put to a vote, in which case it would undoubtedly pass the House. The committee recommended that it be continued and that the President, as heretofore, be empowered to appoint an auxiliary committee of forty-eight, one member from each state, to assist the regular committee and be of the committee in case the resolution is passed by Congress and reaches the States. The motion was adopted.

Legal Aid Committee

Mr. Reginald Heber Smith, chairman of the Committee on Legal Aid, made a brief report. Most of the members by now, he thought, were reasonably familiar with the subject. To those to whom the matter was new he suggested the reading of a bulletin published by the U. S. Department of Labor in March of this year, entitled "The Growth of Legal Aid Work in the United States." He especially recommended the reading of the preface to that bulletin written by Chief Justice Taft, which in a page and a half would give the reader a classic exposition of the underlying philosophy of Legal Aid, its present importance and its future possibilities. At the St. Louis meeting in 1920 he felt called on to express his disappointment with the American Bar for what seemed to him its slowness in understanding the legal difficulties of the poor. He was especially glad to say today, however, that the conviction had been deepening and strengthening from year to year that the American Bar would undoubtedly see that legal aid work was carried on.

The Committee on the Incorporation of the American Bar Association was continued at its request, after which Mr. MacChesney of Illinois presented a resolution requesting the Executive Committee to work out a plan whereby, in the absence of a member of the General Council, certain designated persons shall act instead, either by providing that the vice-president and members of the local councils shall act in succession, or by providing for the election of an alternate by the delegation from the state at the same time as the election of the member of the General Council, or through some other method whereby it may be ascertained in advance who will represent the state in the absence of the regular member. The resolution was referred to the Executive Committee.

New Officers Elected

Chairman Armstrong of the General Council presented its unanimous nomination of the following for officers of the association: President, Charles S. Whitman of New York; Treasurer, Frederick E. Wadhams of New York; Secretary, William P. MacCracken, Illinois; Members of the Executive Committee: Jesse A. Miller of Iowa, William M. Hargest of Pennsylvania, Amasa C. Paul of Minnesota, William C. Kinkead of Wyoming, Henry Upson Sims of Alabama, James Weston Allen of Massachusetts, James F. Ailshie of Idaho and Frank Pace of Arkansas. The nominations were unanimously approved, after which President Long appointed Mr. Armstrong of New Jersey, Mr.

Newlin of California and Mr. Kinkead of Wyoming a special committee to escort the President-elect to the platform.

William P. MacCracken, chairman of the Committee on the Law of Aeronautics, presented the report of that committee. Its first and third recommendations had already been acted on by the adoption of certain amendments to the By-Laws. He thought the remaining recommendation, "that the committee be authorized to tender its services to the Secretary of Commerce to assist in drafting regulations under the 'Air Commerce Act of 1926'" should be adopted. He happened to know that the Secretary would welcome such assistance. It was gratifying to report the passage of this Act, a rather full account of which had appeared in the June JOURNAL. It had also been gratifying to receive a letter from Hon. Schuyler Merritt of Connecticut, chairman of the sub-committee in the House which had handled the matter from its inception, expressing the thanks of that committee to the Association for its assistance in the work. On motion the recommendation was adopted.

Proposed Code of Insurance Law

Mr. William Brosmith of Connecticut, chairman of the Committee on Insurance Law, stated that their report was one of progress. They had completed a redraft of the Code of Insurance Law, but for a number of reasons it had been impossible to have it printed and sent out with the other reports to the members of the Association. Therefore in behalf of the committee he was going to offer a resolution which in fact he would have been inclined to offer even if the report had been completed in time, in view of the importance of the work. The resolution was "That the Committee on Insurance Law furnish copies of the printed draft of the Proposed Code of Insurance Regulatory Law to the Commissioners on Uniform State Laws, the National Convention of Insurance Commissioners, and to the organizations which represent the different departments of Insurance, and that the final draft of the Code, revised to correspond to the instructions given by this Association at the meeting in 1925, and such criticisms and suggestions by the several organizations above referred to, which may be found helpful, be presented for the action of this Association at the annual meeting in 1927." The resolutions were thereupon adopted.

Mr. MacChesney of Illinois moved a reconsideration of the vote by which on the previous day paragraph seven of the Report of the Committee of Commerce, Trade and Commercial Law was defeated, with the idea of clearing up all possible grounds for a conflict between the committee on Commerce and the Commissioners on Uniform State Laws. The motion was seconded and carried, after which he moved that the following substitute for this paragraph be adopted: "Resolved that the Committee on Commerce be given further time for investigation and consideration in the matter of the regulation of Interstate Commerce carried by motor vehicles, and that it report its recommendations consistent with the regulation of motor vehicles and highways as heretofore approved by this Association in the Uniform Motor Vehicle Code." The substitute was thereupon adopted.

Secretary MacCracken presented a resolution passed that morning by the Colorado Bar Association expressing "its gratitude and appreciation to the American Bar Association, its officers and members, for honoring us by their attendance at Denver during its Forty-Ninth Annual Meeting." President Long announced that the resolution would be placed on file and incorporated in the proceedings of the Association.

President-Elect Whitman's Remarks

The committee appointed to escort the newly elected President to the platform, having by this time gotten in touch with Governor Whitman, announced itself ready to report. Governor Whitman was escorted to the platform and presented to the Association, which received him with much applause. He spoke briefly, as follows:

"Fellow members of the American Bar Association: I am keenly appreciative of and very grateful for the honor, for I believe it is the greatest honor that can come in the lines of his profession to an American lawyer to be the choice of this Association for the position of leadership for a year. This is the greatest lawyers' association in the world. I am not altogether sure of jour judgment, but I do appreciate your kindness and the very great obligation under which you have placed me, and I pledge to you during the year that is to come the best that is in me in the service of this Association, of the great profession to which we belong, but above everything else of the great country to which this profession has rendered so much all down through the years. I shall strive to be a worthy successor to the distinguished gentleman who is still the president of this organization, who has been its leader for the past year, and who has discharged its duties so ably and worn its honors so gracefully."

President Long then introduced Sir James Aikins, President of the Canadian Bar Association, who made a few remarks. The chair then recognized Mr. Gurney Newlin of California, who presented the following resolution:

"The American Bar Association at the close of its Forty-ninth Annual Meeting, marked by the largest attendance in its history and by the the consideration of vital and timely subjects concerning the efficient administration of justice in the civil and criminal courts of the land, desires to express its indebtedness to the Bar of Colorado and of Denver for hospitality peculiarly friendly and uniformly helpful. Even in these inspiring surroundings the great success of this gathering could not have been attained without the generous co-operation of Denver's lawyers and citizens.

"We especially desire to thank the women of Denver for the delightful entertainment which they have given to the members of our families who have accompanied us.

"The week spent in this beautiful city will never be forgotten by those who were privileged to enjoy it, and during the years to come we shall always recall this meeting with only the most pleasing recollections."

President Long here added a word of special appreciation of the aid which the Boy Scouts had furnished the Association at the meeting, after which the motion was adopted and the meeting declared adjourned.

RECENT CHANGES IN ENGLISH LAW OF PROPERTY

Acts Constitute Greatest Reform of Law England Has Seen for 266 Years—Consummated Under Brilliant Leadership of Lord Birkenhead—Sweeping Nature of Changes Introduced—No Legal Ownership of Land Except Fee Simple and Term of Years Absolute—Effect as to Local Customs of Descent, Inheritance, Devolution of Property on Intestacy, Dower and Curtesy and Mortgages*

By Duncan Campbell Lee
Barrister of the Middle Temple, London

THE generosity of your welcome and the fact that my dear friend Mr. Saner is my sponsor to this great audience are ample reward for coming five thousand miles to deliver this address. When I realize that I am the guest of my own countrymen, am only an ordinary member of this Association, and hold no office of profit or trust under my own or any other government, my heart is warmed at the invitation I have received and at the welcome you have just now generously granted me.

We are accustomed to hear that a certain chivalric admiration and respect for woman is a distinguishing characteristic of the American people. If that be so, I am sure the next leading characteristic is that of kindness. An English friend of mine has recently traveled by motor car from Seattle to New York and incidentally come in touch with thousands of our people. I have heard him tell his friends more than once, with evident satisfaction, that he did not experience, during the whole of that long trip, a single discourtesy, but only kindness after kindness. As guests of the Colorado Bar Association at this memorable meeting, we are all ready to say the same thing. The brilliant and versatile President of the Colorado Bar has told us in song of a wonderful kindness that was met with on "The Old Santa Fe Trail." I personally wish to say: The Denver Trail is good enough for me!

I am not here in any official capacity and I have no right to speak for the Bar of England or any part thereof, but I do bear greetings from the Lord Chancellor, whom I met just before leaving London. He asked me to convey to the officers and members of the American Bar Association his best wishes for a successful meeting, and to say that he recalled his own visit as their guest with the greatest satisfaction and pleasure. I am happy and proud, Mr. President, now to extend to you the hearty greeting of the Rt. Hon. Lord Cave, Lord Chancellor of England.

If I were to speak to you of the recent General Strike in England, I feel that I should at once have your attention and sympathy. As lawyers you saw how civil order asserted itself over a force apparently invisible, chiefly because the people of England and Scotland have been trained to respect the Law. It was the Law that triumphed in the face of Revolution; and doubtless you admired as well the dignity of a people that could end so vicious an attack on liberty and law without the shedding of a single drop of blood or the loss of a life.

While these matters have been filling the press, another revolution has been quietly, stealthily, going on—a revolution in the law itself. Perhaps, considering the way all English institutions grow—piecemeal, gradually, (much like the oak!)—I should merely say with moderation that some new ideas in law have been evolving. In fact they have already evolved. Their effect is a sweeping change. The law of property has not been abrogated, but a great section of it has been assigned to the lumber room. A gigantic scheme of reorganization has been brought into being. The great legislative experiment will, of course, interest every scholar of the law. I venture to suggest that it should be watched with peculiar interest by legal practitioners in those States of the American Union in which any part of the old property law of the Mother Country is still being followed.

A new system of property, that uprooted many customs and rules of daily use and swept away familiar notions of lawyers and the general public, came into operation on last New Year's Day (1926). Yet the public was strangely ignorant of what was taking place; it came in unawares like a thief in the night—at midnight, 31st December, 1925-1st January, 1926.

Perhaps the most effective teacher of what the new changes mean is Professor de Montmorency, the Quain Professor of Comparative Law in London University, a jurist of the highest distinction, who broadcast an address on the subject just after Christmas. Few, if any, of the millions who heard him will forget his "Sad Case of Miss Noakes," or the point of law he thus enforced:

"If Mr. John Noakes, the absolute owner of that pleasing estate, 'Broadacres,' a dear old bachelor whose only relative, a second cousin, Miss Jane Noakes, keeps house for him, dies on Thursday next (December 31st) without leaving a will, Miss Noakes will succeed to 'Broadacres' as heiress-at-law, and will also succeed as next-of-kin to the plentiful money that keeps up the estate, as well as to the furniture and goods, pictures and books of which old Mr. Noakes is so proud. If, on the other hand, Mr. Noakes survives till Friday next and dies five minutes after midnight has ushered in the New Year, the Crown—that is to say the Exchequer—will take everything; and Miss Noakes

*Address delivered on July 15 at the 49th Annual Meeting of the American Bar Association, at Denver, Colo., July 14-16.

may be a pauper dependent on the charity of the officials of the Exchequer."

Thus was picturesquely told the passing of the Heir-at-Law in England. Those prolonged searches, often carried on for years—even extended over the whole world—those quests for the next-of-kin, which often cost most of the value of the property at stake; quests sometimes yielding no result, sometimes resulting in the discovery of so many kith and kin that the shares of the recipients were infinitesimal—these are all gone (or all but gone) forever! First cousins and uncles and aunts are, as a rule, at hand, or at least well known and easy to be found; and second cousins no longer count.

Many of the reforms of which I speak this evening originated with suggestions made by Frederick W. Maitland many years ago. Before the Great War, Lord Haldane had produced a reforming bill in tentative form and that became the basis of subsequent laborious thought on the part of all post-war Lord Chancellors, but particularly Lord Cave and Lord Haldane himself, both in and out of office. They were assisted by eminent specialists in Chancery practice, including Sir Frederick Pollock, Sir Benjamin Cherry and my own valued preceptor, Sir Arthur Underhill. Finally, the legal reform was consummated under the brilliant leadership of Lord Birkenhead when he was Lord Chancellor in 1920. It was not Lord Birkenhead's intention, when he introduced the Bill which became the Law of Property Act 1922, that it should come into operation. His idea was that it should later be amended, as it was in 1924, and then that there should be a re-framing of all existing statute law relating to property. This came about last year when there were passed by Parliament the following six Statutes, which received the Royal Assent in April: The Law of Property Act 1925; The Administration of Estates Act 1925; The Settled Land Act 1925; The Trustee Act 1925; The Land Charges Act 1925, and The Land Registration Act 1925. On the authority of Sir Arthur Underhill, these six Acts consolidated some seventy-seven previous statutes. Lord Birkenhead laid the foundations for this consolidation by carrying through Parliament very considerable alterations relating to property generally, and to the subjects of devolution on intestacy, settlements, trusts and registration. His were the sweeping changes that abolished copyholds and customary estates and perpetually renewable leases. His name therefore is rightly associated with all the six new statutes which, forming as they do a completely new system, will doubtless always be known as "Lord Birkenhead's reform."

The new Acts are very voluminous, covering about eight hundred pages. They are also detailed; but as Lord Birkenhead said in 1920 in moving the second reading of his Bill: "Your statutes, owing to the immense complexity of modern life, must be long and they must be involved. Entire simplicity is impossible. But though one cannot have simplicity in detail, there is simplicity to which one can, I think, attain,—namely, simplicity in principle. Let your leading ideas be clear and few."

Then he gave a picture of the laws of property as they stood in 1920:

"We have on the same ground two independent principles with a separate origin and a separate history and an inconsistent application—one governing the law of freehold land, another the law of goods and other personal property. To these we have added a third, a kind of hybrid of both, the law relating to leaseholds, sometimes called 'chattels real.' There are also two smaller separate growths, gavelkind and borough English tenure—one applicable by a geographical eccentricity to the greater part of Kent, and the other to numerous ancient towns. Intermingled with these is an immense jungle in the form of the numerous and varying customary laws of countless separate manors scattered all over the country.

"The first thing, of course, is to cut away the jungle," he declared with characteristic incisiveness, "and remove the smaller separate systems—the copyhold and customary manorial law, and also gavelkind and borough English. . . . We then come to the three great subject matters—real property, personal property, and chattels real. It is the object of the Bill to substitute for these three bodies of law, one single body taken mainly from the law of personalty and chattels real. . . ."

At each successive stage of the Bill, Parliament was assured: "This Bill will effect a greater simplification in the practice of Conveyancing, without, however, destroying the power to settle land, than any measure hitherto proposed." Yet after six months of trial, I am told there are many solicitors and counsel who are not impressed with the simplification. Mr. Frederick Edward Farrer, a most learned Conveyancing Counsel, in a recent lecture on "Tenancy by the Curtesy of England," which the new Acts abolish, said that under this special, and as it would seem, old-world head of law, there might be as many points of difficulty in the new time as in the past.

A few days ago the "Evening Standard" published this note in its columns under "A Londoner's Diary" ("Evening Standard," Saturday, June 19th, 1926), apropos the Lord Mayor's Annual Dinner to His Majesty's Judges, "Lawyers at Dinner," "The Lord Chief Justice has a pretty wit and those at the top table and near it enjoyed quite a feast of quiet fun. His gravely uttered dictum that 'our new laws of property have been concentrated into six simple acts which anybody can understand,' occasioned much professional laughter."

I have had an added respect for Lord Birkenhead since 1920 when he used the word "jungle" to describe the mass of medieval law and custom and statutes that constituted English Law of Property previous to that date. I have been lost in that jungle more than once while a student. You will recall that Blackstone was not so blunt in his description:

"To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate."

—a branch which needs much reading and rereading in order to make the student at last feel at home in it—but courage! As he says elsewhere,

making his own the comforting words of Sir Edward Coke: "albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself but proceed; for on some other day, in some other place" or (Blackstone adds in parenthesis) "perhaps upon a second perusal of the same, his doubts will be probably removed"—an excellent precept not only for students of law but for all serious students of any learning whatsoever! He might have added that not a second perusal but several may sometimes be needed.

Following that admonition, by dint of second perusals I did at last succeed in my student days in obtaining a fair knowledge of English law of property, but I as an American found it difficult to enter into a full understanding of the reasons for three distinct systems of land laws: (1) freehold and (2) copyhold both founded on tenure and feudal theory which had long ceased to exist in reality and (3) leasehold, founded on ownership and regulated by contract. No one could answer: "What is the use of copyhold?" for no one knew. It was certainly absurd.

Sir Arthur Underhill used to tell of a house that stood on less than half an acre of land. The greater part of the site was freehold in fee simple, but a few square yards of the kitchen and dining room were held for a term of two thousand years at a peppercorn rent with a covenant to keep in repair a wall (which had become useless to anyone) and a proviso for re-entry on breach of that covenant. If the owner had died last year intestate leaving a widow, the greater part of the half-acre would have gone to the heir, subject to the widow's right to a life interest in one-third of it for her dower, while one-third of the leasehold part of the dining room and kitchen would have gone to the widow absolutely and two-thirds to his next of kin, if that individual could have been found. A perfect case surely of *reductio ad absurdum*.

One of the first persons to welcome me to Denver this week was a young lady of charming personality who naïvely expressed the hope that my address would have in it "plenty of jokes." I replied: "I am sure you will find the English law of property one huge joke, amusing from beginning to end."

Nor could anyone tell me why it was necessary to continue the local customs of descent. By the old English Common Law up to 1925 the eldest son, subject to certain rights possessed by his mother, succeeded to land by primogeniture on the death of his father intestate. If the dead man left no son, his daughters, subject to their mother's right, succeeded to the land equally, while if he left no children, the nearest eldest male relative on the father's side succeeded, however remote the relationship.

But in thousands of places local customs overrode that Common Law. In many places, even in London, it was the youngest son, or the youngest nephew, or youngest cousin, who succeeded, subject to the widow's rights, when the landowner died without leaving a will. On the other hand, in many places, but chiefly in Kent, the custom of gavelkind prevailed, and then it was not the eldest or the youngest that succeeded: all the sons, or all the nephews, or all the cousins of a certain degree, which might be a very remote degree, succeeded equally. In the West of England I found still stranger customs that controlled descent of land. It was possible when a landowner died, without leaving a will, that the males would not succeed at all. It might have been the eldest daughter or the youngest daughter or even the widow who succeeded to the landed estate.

All those customary modes of descent, a hundred and three different kinds, representing not only the romance of the middle ages, but a romance of far earlier times that had persisted in spite of the coming of Normal feudalism,—all those customs were alive in England up to Last New Year's eve. They disappeared when midnight struck.

You are all familiar with so-called English Manorial incidents. Almost all England is divided up into Manors which were consolidated into their present form by the Normans and their successors, some eight centuries ago, but which represent far earlier forms of local organized life. The Lord of the Manor possessed certain important rights and privileges which were of money value. He could impose upon the tenant fines and forfeitures (or premiums) for renewals and a sum, called relief, on the death of the tenant. The Lord had a right on the death of a tenant to take the best beast, or sometimes the best chattel, called a "heriot." He had also mineral and timber rights. All these were effective incidents last year. They have now passed away forever.

Under the new Acts, title to land held from a Lord of the Manor must be enfranchised into freehold, the tenant to pay compensation within ten years to the Lord and Steward of the Manor. The Manor itself is not destroyed; it will now be seen to be what it has in fact long been, "an historical ghost." Certain famous services connected with land which only emerge at the time of coronations, "Grand and Petty Sergeanty," have been preserved as historical land-marks. They were preserved in 1660 when the bulk of English feudalism was destroyed by statute; they are now to continue. With this exception, and excepting also certain ecclesiastical tenures known as frankalmoign, all land in England is now and will be henceforth held in "free and common socage"; that is to say, it will be freehold. That, then, is the first great reform achieved by the new acts,—the abolition of copyholds and customary tenures and the making of all land freehold.

I now come to the changes respecting inheritance.

We Americans have been brought up to the fair rule that in cases of intestacy all the children should inherit equally. We owe that of course to the foresight and audacity of Thomas Jefferson, when he successfully passed through the Virginia House of Delegates in the face of an aristocratic society a resolution abolishing primogeniture in the New State. What then was passed into law in one State soon became, as you know, the fixed custom of all, until now after a hundred and fifty years, for a parent in the United States to prefer a first-born son over other children merely because he was first-born, would be considered un-American.

For eight hundred years, however, throughout England there has been developed another idea,

The Norman Kings established the succession of the eldest son to land, and bound him to service to the Sovereign under a system of feudalism. Responsibility for this or that landed estate on the part of the head of the family to other lords as well as to the Sovereign was thus easily fixed.

For hundreds of years the English people were trained to believe that the succession of the eldest son was the only true theory of heirship. Primogeniture became the fetish of the English Law of Property.

I was myself, and I do not doubt many others were, taken by surprise, therefore, when the new law of succession on intestacy was first made public and we saw that Primogeniture—which some thought represented the true England—had been completely abolished. In the course of the debate in parliament it was made known that, after all, the ancient law had not so perfectly represented English modern thought as we had been led to suppose. A careful examination of tens of thousands of modern wills showed that the rule of inheritance of land by the eldest son was not the rule that most people adopted when they came to make their wills. In the few cases where by will or settlement the eldest son was preferred, the landed estate was very large; it was almost never done in the case of estates of moderate size.

The New Administration of Estates Act is based upon what has been found by experience to be the most usual provisions that a testator makes for his wife and children or other relatives.

It is the result of careful examination and tabulation of a very large number of wills on file at Somerset House, where, as you know, there is a register of all wills and testaments now made in England and a collection of old wills from the Diocesan Registers dating back to the year 1382.

Not only does the new Act abolish primogeniture and disestablish the heir, it enacts a completely new code of distribution on intestacy, restoring the mother to her ancient priority over brothers and sisters, excluding, as I have already illustrated, second cousins and remoter kin, and placing husband and wife on equal terms as to each other's property. In English criminal law husband and wife are still for some purposes one; a husband and wife, for example, cannot be guilty of conspiracy together. Under the new law of property, in the case of a gift of land to a husband and wife they are treated as two persons.

Formerly a conveyance of land to a husband and wife as joint tenants made them "tenants by entireties." The effect was that the husband could deal with rents without his wife's consent, but he could not sell the fee simple without her concurrence. On the death of either, the whole went to the survivor absolutely. Under the new Act every tenancy by entireties is converted into a joint tenancy.

I shall now treat of the new law respecting devolution of property on intestacy.

On the death of a person without a settlement of money or land and without making a will, all his real and personal estate will devolve in the same way. After payment of claims, it is to be held by his personal representative upon trust, for certain near relatives limited to the descendants of the same grandparents; that is, within the orbit of cousins. If there is no will, a surviving husband or wife takes all the personal chattels, such as furniture, pictures, plate, etc., absolutely. In addition, if the residuary estate amounts to less than one thousand pounds, the husband or wife takes it all. If the residuary estate amounts to more than one thousand pounds and if there are no children or descendants, the husband or wife takes in addition to the thousand pounds a life interest in the rest of the property. If there are children, then the husband or wife has a life interest in half the property and the children divide between them equally the other half at once, and the husband's or wife's half on his or her death. In other words, subject to the rights of the husband or wife, the whole residue is held on trust for the children of the intestate on what are called "Statutory trusts."

If the dead person leaves children but no husband or wife, there is an immediate division of the whole estate equally between the children.

If there are no children, the whole property goes to the parent or parents of the dead person, subject to the rights of husband or wife.

But if the dead person leaves no children and no parents, then, subject to the rights of husband and wife, the residuary estate passes equally in the following order:

(a) to brothers and sisters of the whole blood,
(b) to brothers and sisters of the half blood,
(c) to the grandparents if alive,
(d) to the uncles and aunts of the whole blood equally if alive or if dead to their descendants by stocks,
(e) to the half uncles and aunts equally if alive or if dead to their descendants by stocks.

If there are no first cousins, then the husband or wife of the deceased takes absolutely; but if there is no husband or wife living, then the Exchequer takes the whole residuary estate.

Second cousins, the descendants of great-grandparents and remoter relatives are excluded. "Miss Noakes," however hard her case may be, cannot inherit. The answer is that Mr. Noakes could have provided for his second cousin by will if he had wished to do so.

The changes respecting dower and curtesy rights are also interesting and important.

Under Common Law a husband has a right, the principle of which is still recognized by many, if not most, of our American States, to an estate for life in the whole of his wife's lands, provided she was solely seized of an inheritance (not jointly) and provided there was any issue of the marriage capable of inheriting, born alive. The test was whether the child was heard to cry. If any child was born sufficiently alive to cry out, then the father took an "estate by the curtesy of England." Curtesy in gavelkind was one-half, and there was no necessity for birth of issue. All this is also abolished by the new Acts. Likewise Dower, the familiar right of a wife to one-third of her husband's lands for her life, is abolished; but as I have stated she gets on intestacy £1,000 absolutely instead of £500 under the old law, and she and her husband are to have equal rights in the property of the other.

Hereafter, there will be no legal ownership of land except fee simples and terms of years absolute. The ancient Statute of Uses is repealed and

all those bugbears (which some have found to be nightmares):—contingent remainders, shifting and springing uses, protectors of the settlement, executory limitations, and that famous old technicality, "The Rule in Shelley's Case," will no longer stand in the way of an intelligent understanding of English Law. They will hereafter be found only in legal museums.

Settlements of land, whether freehold or leasehold, will be made in equity by means of a trust, and it will hereafter be possible to tie up stocks, shares, chattels and leaseholds in the same way that landed estates have been tied up or entailed; subject always to the rule against perpetuities, which in England is for life or lives then in being and twenty-one years after the termination of such life or lives, with the possible addition of the period of gestation.

Students of comparative legislation will find food for thought in other amendments, for instance certain "curtain provisions," so called because they place naked equitable interests decently behind a legal curtain, by providing that they need not be disclosed when the material interests of the beneficiaries are protected.

Also, the radical change in Mortgages. The new legal mortgage of land held in fee simple will be created in one of two ways: (1) by a lease of land for two thousand or three thousand years, subject to a proviso for cesser of the term on redemption, or (2) by a charge by deed expressed to be "by way of legal mortgage." The study of no subject in the whole realm of law has given me more satisfaction and pleasure than that of Mortgage as it has developed in English and American practice out of Common Law, into Equity, and as influenced and modified by Statute. Tonight I can merely suggest the New Law of Property Act as a field for fruitful study for anyone interested in a like manner.

The English will not hereafter use that effete expression "Indenture" in documents of conveyance. Each deed will be called by the name by which it is known in practice. A mortgage will begin: *"This Mortgage Deed* made the....day of...." and after the recital will proceed: *"And this Deed also Witnesseth."* A charge by way of legal mortgage will begin: *"This Legal Charge* made," etc. A settlement of land will say: *"This Settlement,"* etc., and the instrument creating the trust will begin: *"This Trust Instrument is made,"* etc.

By reason of the repeal of the Statute of Uses, it will no longer be necessary to say: "To the Use of" in every *habendum*.

Let me now group a half-dozen interesting changes into half a dozen sentences:

A legal estate cannot be conveyed to an infant; to avoid the necessity of evidence of age by parties to a conveyance of legal estates, it will hereafter be presumed that the parties to deeds are of full age. It will no longer be necessary for a purchaser to make enquiry respecting this matter.

Where two or more persons die together in circumstances that render it doubtful which of them survived the other or others (e. g., in a disaster at sea or in an accident on land) they will hereafter be deemed to have died in order of seniority.

A will expressed to be in contemplation of marriage is not as heretofore to be revoked by the solemnization of the marriage.

The tiresome rule against gifts to the unborn child of an unborn child, the so-called rule against double possibilities, has been repealed.

The inconvenient doctrine of *interesse termini* is also abolished and hereafter all reversionery leases are to take effect at once at legal terms.

All powers of attorney, if relating to land, must be filed, and—which is a matter of great importance—a statutory declaration by an attorney to the effect that he has not received notice or information of the revocation of his powers, if made immediately before or within three months after any payment to or act by him, shall be taken to be prima facie proof of non-revocation.

It will probably surprise you to know that registration of deeds and wills has not been made compulsory in England by the Land Registration Act 1925. The old law made registration of title (to a limited extent only) compulsory in the Counties of London, Middlesex and Yorkshire, and permitted extension by an Order in Council, when any county council requested such extension. This gave the local land-owner the key to the situation. The result is that the Act was not extended. The new law removes the County Council veto and after an interval of ten years, in order to test the new method (a characteristic English procedure), Compulsory Registration may be extended by an Order in Council if approved by both Houses of Paliament. So that in the year 1936, there may be compulsory registration of titles throughout the whole land.

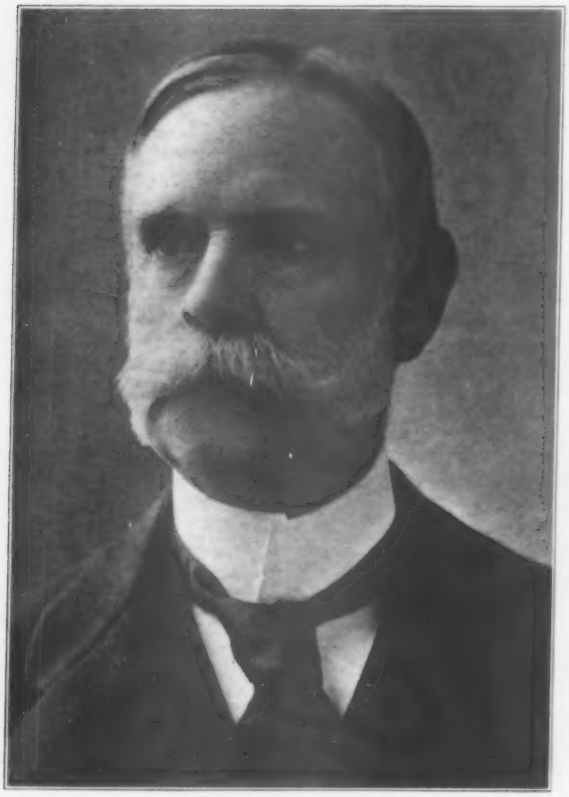
I judge that there is some confusion respecting the terms of the new Trustee Act 1925, particularly as applied to the administration of assets in England belonging to American estates.

The Administration of Estates Act 1925 provided that "(14) (1) Where a trust corporation is appointed an executor in a will either alone or jointly with another person, the Court may grant probate to such corporation either solely or jointly with another person as the case may require, and the corporation may act as executor accordingly."

But that does not mean a trust corporation in the American sense; such a corporation cannot act as Custodian Trustee in the British Isles. The familiar "Trust Company" of all our States has no authority to administer English property under an American will or an American Grant of letters of administration, even though it may have a Branch in England and though it be empowered to carry on a banking and financial business there.

In all the new English Property Acts, including the new Trustee Act, and the Amending Bill 1926, "Trust Corporation" means "the Public Trustee" or other person holding an official fiduciary position and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration or for charitable purposes. This excludes, of course, American Trust companies which may be operating in England.

Administration of the English assets of an American estate can be carried out effectively by the appointment of some individual, under a Power of Attorney with copy of will and American Pro-



ALFRED HEMENWAY
One of Association's Founders honored at Denver Meeting

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Former Solicitor General of the United States

bate attached, duly authenticated, or "legalized" as the foreign expression is, before a British Consul in the United States.

English executors and trustees can charge no remuneration for their services, unless the will or trust deed explicitly authorizes such charge, and always excepting the Public Trustee. On the other hand, an ancillary administrator in England appointed on behalf of an American executor would be paid such fees as the American law provides or as had been agreed between the parties.

Such is my very inadequate sketch of the more salient features of the recent changes in the English Law of Property. Only experience can tell how beneficent the provisions of the various Acts may prove to be, or how suggestive for lawyers and legislators in other countries.

But so far as the eye can see, the Acts constitute a true reform, the greatest reform of the law England has seen for 266 years, and I am confident that it will have an effect upon future legislation in many States where Common Law prevails. It gives a death-blow,—rather belated perhaps—to that feudal system which has dominated English thought since the time of William the Conqueror. It establishes for the first time legal equality of property rights in the English family, as between brothers and sisters, husbands and wives. It is a new charter for women. It is a new victory for the common people. It is a bold declaration that no longer shall the specialized conveyancer keep English property as Shakespeare puts it, "cabin'd, cribb'd, confined." It assimilates as nearly as possible the means of transfer of real property to the means of transfer of personal property. It opens up new fields of influence for trusts and trustees, in which no nation has excelled (and perhaps none has equaled) the English. It has cleared up the confused and tangled growth of centuries. It has in fact, I think, successfully cut away the jungle.

As inheritors of some of the blessings of the Common Law (and some of its inconveniences), let us as American citizens be grateful to Lord Birkenhead for his efforts in pushing to consummation this great and notable reform.

Where to Find Human Nature

"Whether a lawyer confines his activities to the office or engages in addition in the wider field of the trial of causes, he must deal with human nature. He should be a student of it at all times and under all conditions, but the pressure of his professional work, the necessities of social life and the limitations of a short lifetime will prevent his learning what he needs to know solely from contact with people. He is forced to go to the writers whose work has been or is the study of human lives in every conceivable state and condition and to portray their natures, characters, dispositions, minds, souls and environment, which lead men and women to depart from the usual course of conventional life to follow a vicious life or a criminal career, or to change and shift from one state or condition of mind to another leading to happiness or to misery in the situations in which the novelist places them in working out the theory or plot he has in mind."—*Frank J. Loesch in Illinois Law Review (June).*

JUDICIAL COUNCILS

Haphazard Method by Which Reforms in Judicial Systems of States Have Heretofore Been Brought About—Creation of Judicial Councils for Continuous Study and Recommendation in Various States—Genesis and History of Idea—Hostility to Plan—Methods of Work of Massachusetts Body*

By Robert G. Dodge
Of the Boston, Mass., Bar

FOUR years ago, for the first time in this country, the legislature of one of our states provided by statute for the creation of a permanent official board consisting of judges and practising lawyers, "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the State . . . the work accomplished and the results produced." A biennial report to the legislature upon the work of the courts was provided for, with "recommendations for modification of existing conditions," and provision was also made for the submission to the courts from time to time of suggestions "with relation to rules and practice and procedure."

Since the first judicial council, so-called, was thus created in Ohio similar councils have been established in four other states, and bar associations elsewhere are taking the matter up and appointing committees to investigate and report. Whether these councils will fulfil their purpose the future only can tell, but the experiment is an interesting one.

In the past reforms in the judicial system of the several states have been largely brought about in a haphazard way. There has been no official or board whose duty it has been to study continuously the operation of the courts, assemble statistics and other facts, search for means of improvement and recommend desirable changes. The legislatures have been more interested in other matters. Temporary commissions have been appointed to consider particular problems, and have made reports. Bar association committees have striven intermittently and often ineffectively to effect reforms. Much has been left to the initiative of individuals, and the results have not always been fortunate. The profession has been justly criticized for inattention to the problem, and complaints of the work of the courts have been voiced in increasing volume.

It may be that the judicial council idea is to be traced to the conception of a ministry of justice which has of recent years received such weighty indorsement. Such a ministry is needed, Dean Pound said in 1917, "charged with the responsibility of making the legal system an effective instrument for justice," and consisting, as he put it, of "a body of men competent to study the law in its actual administration functionally, to ascertain the legal needs of the community, and the defects in the administration of justice not academically or *a priori*, but in the light of everyday judicial experience and to work out definite, consistent, lawyerlike programs of improvement." This suggestion was indorsed by Judge Cardozo in 1921, in his brilliant address before the Association of the Bar of the City of New York, in which he deplored the fact that the courts are not helped as they ought to be in adapting law to justice, for the reason that they and the legislature "work in separation and aloofness," and there is no one to mediate between them, no one to give warning that help is needed. "The legislature," he said, "informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. . . . The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged."

Judge Cardozo's ministry of justice would have within its purview the whole domain of substantive law, but his reasoning is, in part at least, the same as that on which is based the less ambitious plan of creating permanent official boards for the continuous study of the organization, practice and procedure of the courts.

The first specific suggestion of a judicial council of the kind now under discussion appears to have been made in 1921 by the Massachusetts Judicature Commission, a temporary body, appointed under an act of the legislature to investigate the working of the courts and make recommendations. In the course of an elaborate report the commission called attention to the fact that the courts of Massachusetts had developed as separate organizations, having very little relation to each other and that there had never been "any central body of a permanent character for the accumulation of information and the consideration and discussion of questions of organization, practice and procedure bearing on the subject of judicial administration." The commission declared that "it is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals," but that there should be a central official body, consisting partly of judges and partly of lawyers, for the continuous study of questions relating to the courts, charged with the duty of investigating the facts and reporting annually to the governor.

Massachusetts was not the first state to follow this recommendation. Ohio, as I have said, took the lead by establishing a judicial council in 1922. Oregon followed in 1923 and Massachusetts in 1924.

*Address delivered on July 15 at the 49th Annual Meeting of the American Bar Association, at Denver, Colo., July 14-16.

In 1925 such councils were established by legislation in North Carolina and in the state of Washington, and in the same year the proposal was endorsed by the state bar association of Pennsylvania and North Dakota. The matter is now under consideration by the Bar Association of Kansas, and it is very likely being discussed in other states.

While Congress, acting upon the recommendation of Chief Justice Taft, provided in 1922 for an annual conference of the senior circuit judges of each circuit, which should be of great benefit, this is not a judicial council in the sense in which I think the term should be used. Perhaps the term itself is a misnomer, suggesting a board which is a mere adjunct of the courts. But that is not the idea at all. The idea is that the council, although containing representatives of the courts, shall be an official body, independent of the courts, that it shall include practising lawyers, and that its functions shall be very different from those of an occasional conference of judges.

It may be said in passing that the need, if there be one, of a judicial council can by no means be supplied by conferring broader rule-making powers on courts. Many of the problems which must be considered by the councils are problems with which only the legislature can ultimately deal. Not the least important function of the councils, moreover, is to assist in the exercise of the rule-making power by making suggestions to the courts based on a study of the facts which the judges alone have not time to make and on a combined practical experience with the working of existing rules much broader than that of any one court. If in a sense the judicial council supplies the need, expressed by Judge Cardozo, of an intermediary between the courts and the legislature, so also it may serve as an intermediary between the bar and the courts for the transmission of considered suggestions concerning matters of practice which do not require legislative intervention.

Whether such councils are likely to accomplish the results for which they are created may, in these days of their infancy, be the subject of differences of opinion. Opposition to the idea is sure to be voiced. Indeed, in the state of Pennsylvana, the bar association has this year reversed its position of a year ago and withdrawn its recommendation that a council be created, taking this stand partly because of an apparent lack of interest among the lawyers of the state but chiefly, I believe, because of opposition from the judges of the appellate courts. Hostility to the idea may, of course, be based on satisfaction with things as they are and that ultra-conservatism and dislike of change which often characterizes members of our profession. Perhaps it is more likely to be based on the feeling that, after all, busy judges and lawyers cannot be expected to give much time to the work and that the results are not likely to be valuable. I can hardly believe that in the face of more complete information such objections will prevail generally and prevent the experiment from being tried.

As the Massachusetts council seems, for good or for ill, to have been the most active of any thus far created, perhaps it may be worth while for me to say something of its methods of work, what it has tried to do and the use which has been made of it by the executive and legislative departments of the state government. I speak of these things, not from any feeling that the problem of how a judicial council should function has already been solved in Massachusetts, but simply because there may be something in our experience of two years which will throw light on the question whether or not such councils are likely to prove worthwhile.

The Massachusetts Statute of 1924 provided for a judicial council of nine members, five judges representing the several courts of the Commonwealth and four members of the bar. The purposes and functions of the council are briefly stated in the act. It is designed "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished, and the results produced by that system and its various parts." It is required to "report annually on or before December 1st to the Governor upon the work of the various branches of the judicial system" and it is authorized from time to time to "submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable."

Chief Justic Rugg, who had an election whether to serve himself or designate some other or former justice of his court, appointed former Justice Loring, who had resigned from the bench after twenty years of service and was naturally elected chairman of the council. In any council of this character much will depend upon the personality of the chairman and upon his interest in the work and the zeal with which he conducts it. In these and all other respects the Massachusetts council has been most fortunate in its chairman. Another absolutely essential feature of such a board is an active and diligent secretary. Ordinarily I am satisfied that he should be paid a substantial salary, as he will have much to do, and upon the way in which he does it the success of the council will in large part depend. One of our members, Mr. F. W. Grinnell, performs these functions for us with a diligence and ability which could not be exceeded and without compensation, but I know of no other man in Massachusetts, and certainly there can be few in other states, of the requisite experience and capacity, who would be willing to give so much of his time to public service without pecuniary recompense.

The Massachusetts council began its meetings in November, 1924, and has regularly met since then on every second Saturday morning except during July and August. For some weeks prior to the publication of the first report it met every Saturday. The attendance has been remarkably good, there having been, I think, only two meetings at which a bare quorum of five was present. The problem of attendance is, of course, comparatively simple in a small state where only two of the members must travel as much as a hundred miles to attend the meetings.

The council began by considering the equity rules of the Supreme Judicial Court and suggested a few changes with a view to simplifying and expediting proceedings, and these suggestions were in the main adopted by the court. It then took up a variety of topics, many of which were referred to committees (generally of one or two members) for investigation and report. Judges of the courts and

others were occasionally asked to meet and confer with the council about proposed changes. From judges and members of the bar valuable suggestions have come. Statistics have been gathered, and information has been collected from other states as well as from England. The absence of the power to summon witnesses or to require the clerks of courts to supply statistics has in no way impeded the work of the council.

The first report to the Governor, submitted last fall, shows the nature of the topics the council had under discussion during its first year, and the effort expended on what was fully recognized to be only a modest beginning of the attempt to effect some betterment in the judicial system. The direction which the work should take was influenced in part by a resolve of the legislature, adopted in the spring of 1925, which requested the council to investigate ways and means for expediting the trial of cases and relieving congestion in the Superior Court (which is the great trial court of the Commonwealth) and to consider certain specific proposals of change. This legislative resolve is of interest as being the first of several requests which have been transmitted to the council from the legislative and executive departments of the state government, illustrating a kind of use which may be made of such a body in any state.

In its first report the Massachusetts council dealt with a variety of matters, and while it suggested no startling changes it indorsed several departures from existing practice. It recommended the abolition of the pecuniary limits now set by statute upon the jurisdiction of local district courts, hoping thereby to diminish the burden upon the Superior Court. It recommended legislation like that of Maryland and Connecticut giving persons charged with crime the option of waiving a jury.

The question of framing issues in advance of trial led to so much discussion of the English practice that at the request of the council I went to London in July and made a study of the practice before the masters of the Supreme Court. While I found that there is, generally speaking, no such method of framing issues in England as we had supposed, the study of English practice before trial has suggested much that is of interest, and has led us already to recommend a statute separating mere debt collecting from ordinary controversial litigation and providing a method of expediting the former. The council also recommended in its first report statutes providing for declaratory judgments, for the more effective control of interrogatories, for the eliciting of admissions before trial of facts not really in controversy, and various other acts of local interest designed to do away with defects believed to exist in the Massachusetts practice. With the hope of establishing something like the English commercial cause list a suggestion was made to the Superior Court to the effect that that court arrange by special order for the speedy trial of cases in which the parties file a stipulation waiving the right to a jury trial and the right to appeal except upon questions of substantive law and re-

lieving the court from the necessity of applying the rules of evidence. While the Superior Court has not yet adopted this plan it is now being tried out in the Municipal Court of the City of Boston.

Considerable interest was manifested in this first report of the council and at a meeting of the Massachusetts Bar Association following its publication the recommendations were discussed and in substance approved.

Curiously enough the first suggestion of the council to be adopted by the legislature and to result in a statute was the proposal to do away with the time-honored farce of submitting questions of foreign law to the jury as questions of fact. It is now the law of Massachusetts that the courts shall take judicial notice of the law of another state or country whenever the same shall be material.

Some of the recommendations of the council resulted in legislation, others were referred to the next session of the legislature, still others were doubtless too radical for the judiciary committee and may make their way slowly if at all. It goes without saying that a legislative assembly is not to be expected at once to adopt all the suggestions made by a body like the council. This would be too much like a recognition of the council as a super-legislature, calling upon the representatives of the people to abdicate their functions. Rapid progress at the beginning must not be expected and temporary failures must not lead to discouragement.

It may be of interest to note that after the extra effort of getting out the first report, the council did not rest upon its oars but at once began its second year of biweekly meetings, and the interest of the members has not flagged. The legislature of 1926 has twice, by resolve, requested the council to investigate special matters, one relating to a new method of enforcing bar discipline and the other having to do with the possibility of devising some method of disposing expeditiously, outside the criminal courts if possible, of minor violations of the automobile laws and traffic regulations. The Governor, too, requested a special report from the council on changes in the statutes to expedite the trial of crimes of violence. Before this he had, in his annual address to the legislature at the opening of the session of 1925, made special reference to the first report of the council, urged that it be given careful study, and closed by saying, "We should utilize the work of this commission."

Problems of the general nature of those which confront us in Massachusetts must be constantly presenting themselves elsewhere, and it would appear to be self-evident that they may profitably be referred to a central clearing house of judges and lawyers for investigation and report. Given a membership which is not too large for convenient consultation and efficient action, with a chairman sincerely interested in the work and an able, paid secretary who can devote much time to it, and given an annual apropriation of a few thousand dollars to meet the necessary clerical, printing and traveling expenses, I can see no reason why a judicial council should not do much good in any state.

To enable it to accomplish its purposes more effectively there should as time goes on be attached to every such council a paid staff of assistants or at least funds should be available for the employment of trained men for the investigation of particular topics. When such councils shall have established their value it is to be hoped that there will be no hesitation in properly equipping them for their work. The expense in any event will be but a drop in the bucket as compared with the public benefits which they may bring to pass.

With reference to reform in procedure, Professor Sunderland said before this Association a year ago:

> We feel our way like blind men who fear to fall. In every other field of human endeavor more efficient methods are being sought with restless eagerness and with no concern for the old equipment which must be scrapped. The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age it must itself become progressive.

This is a severe indictment, but public opinion today will hardly sustain a verdict of not guilty. The profession must find where the path of progress lies and follow it. If the creation of judicial councils is a forward step, even though not a long one, there should be no hesitation in making the experiment.

Selective Education in Law

The Yale School of Law has announced its adoption of a policy of limiting numbers and of confining its efforts to training superior students. Instead of being open to all who have graduated from reputable colleges as in the past, the School will hereafter admit only men whom it may expect to make a grade of at least C. This prediction will be based on the applicant's college record, and, when his college is not on the approved list, by a showing that he stood in the highest third of his college class. Applicants not admitted in this way may appear in person for a law aptitude examination, the result of which will be considered in passing upon their qualifications, for entrance. A man who has failed in another law school will not be admitted to Yale. In addition to making these regulations for men beginning the study of law, the Faculty has raised the requirements for students transferring from other schools. Heretofore these men have been asked to submit law school records showing that they have passed their work satisfactorily. The new rule requires transfer students to show a record of B or its equivalent. Another means taken to raise the standard of the School is a new requirement that every student must maintain an average of C or be dropped from the School.

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